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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No.

TERMINAL FREIGHT HANDLING CO. AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners Terminal Freight Handling Co. and Terminal Freight Cooperative Association, charging parties before the National Labor Relations Board, seek a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit which, in an action by Plaintiffs-Petitioners to declare the nature of the duty imposed by Section 10(l) of the National Labor Relations Act upon the Board's Regional Directors to seek injunctive relief, determined that the Director retains certain discre-

tion despite Congress' creation of a "mandatory" duty to act.

OPINIONS BELOW.

The opinion of the Court of Appeals rendering its declaration is reported at ..... F. 2d ....., 77 LRRM 2625. (App. A1)

The Memorandum and Order of the District Court, dismissing the action for declaratory judgment was issued on December 9, 1970 and is reported at 76 LRRM 2251. (App. A20)

JURISDICTION.

The opinion and judgment of the court below sought to be reviewed were filed and entered on June 18, 1971.

Extensions of time within which to file the instant Petition were granted by this Court, on request of Petitioners, on July 1, 1971, August 2, 1971, September 1, 1971 and October 15, 1971*

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the mandatory requirement contained in Section 10(l) of the National Labor Relations Act that the Board's Regional Director "shall" petition for injunctive relief whenever he has reasonable cause to believe a charged violation of Section 8(b)(4)(B) is true and that a complaint should issue permits the Director to exercise discretion to refrain from seeking such relief despite his finding of the requisite "reasonable cause" to believe that the charged offenses occurred and that they should be remedied.

*These extensions were sought in anticipation of the issuance of a decision by the Eighth Circuit in a long-pending case raising related issues to those involved here and expected to be of decisional significance. (Nos. 20462, 20472). That decision, however, has not yet issued.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. Section 151 *et seq.*, are set forth at App. A24.

STATEMENT OF THE CASE.

On June 10, 1970, Local 610, Miscellaneous Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, commenced picketing the premises of Terminal Freight Cooperative Association and Terminal Freight Handling Company[1] and achieved a nearly total cessation of their business.

On June 12, 1970, Terminal filed an unfair labor practice charge (Case No. 14-CC-604) with Respondent Regional Director Solien against Local 610, charging that Union with engaging in an unlawful secondary boycott in violation of Section 8(b)(4)(i)(ii)(B) of the Act. More specifically, Terminal accused the Union, with which Terminal had no labor dispute, of unlawfully picketing their facilities in order to force them to cease doing business with Sears, Roebuck and Co. and other stranger members of the Cooperative Association. As the aggrieved victim of the

1. Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of forty-five independent companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association at more than forty terminals throughout the United States.

For ease of reference, these Petitioners jointly will be referred to as "Terminal" herein.

described secondary boycott activity. Terminal also desired the protection of the relief specifically provided by Congress for such persons in Section 10(l) of the Act:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) . . . (B) . . . of section 8(b) . . . the preliminary investigation of such charge shall be made forthwith and given priority over all other cases . . . in the office where it is filed . . . If, after such investigation, the officer or regional attorney to whom the matter may be referred has *reasonable cause to believe such charge is true and that a complaint should issue, he shall*, on behalf of the Board, *petition in a district court of the United States . . . for appropriate injunctive relief* pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law . . ." (Emphasis added.)

On June 16, 1970, the Regional Director concluded, as a consequence of his investigation of Terminal's charges, that he in fact had reasonable cause to believe the Union had committed the charged violations of law, and he so notified Terminal's counsel. However, on June 18, 1970, the Regional Director further notified Terminal's counsel that he might,—then finally that he would not,—petition the district court for injunctive relief and was, instead, exploring settlement with the Union. The Regional Director refused to seek such injunctive relief despite the express statutory direction in Section 10(l) that he "shall" do so, despite the fact that the picketing which gave rise to the filing of charges continued, and despite Terminal's claim that the Union's conduct remained unlawful.

As a consequence of the Regional Director's failure to abide by the mandatory direction of the statute, coupled

with the continuation of the Union's picketing, on June 19, 1970, Terminal filed a Complaint for Mandatory Injunction to compel the Regional Director to comply with the duty explicitly imposed on him by Congress in Section 10(l).[2] On June 26, 1970, Terminal amended its Complaint to seek, in addition to an order compelling the Regional Director to petition for injunctive relief, (i) a declaratory judgment that the Director's refusal to abide by the mandatory direction of Section 10(l) was itself a violation of the statute, and (ii) a declaration that the internal agency rule, promulgated by the General Counsel in the Board's Field Manual, which authorizes, or permits, or encourages Regional Directors to exercise discretion under Section 10(l) where Congress prohibited the use of such discretion, similarly violates the command of the statute. That Manual provides in Section 10230 (July 1, 1967, as amended March 12, 1969) as follows:

> "Injunctive Relief Under 10(l) . . . Under that Section, injunction proceedings are mandatory; however, if it appears that the union has voluntarily ceased engaging in the conduct and a resumption thereof is not threatened, so that there may be nothing to enjoin, commencement of 10(l) proceedings may be held in abeyance . . ."

On June 29, 1970 the Regional Director did finally petition the district court for the injunctive relief to which Terminal had claimed itself entitled since June 16. The Union did not cease its unlawful picketing until June 29, 1970. Accordingly, Terminal was subjected to thirteen days of unlawful picketing, during which period it was

2. The jurisdiction of the District Court was invoked upon the following statutory and decisional bases: 28 U. S. C. § 1337; 5 U. S. C. § 1005(a); 5 U. S. C. § 1009(a); 28 U. S. C. § 2201; *Leedom* v. *Kyne*, 358 U. S. 184; *Miami Pressmen's Local 46* v. *McCulloch*, 322 F. 2d 993 (CA DC, 1963). These jurisdictional bases were accepted both by the district court and by the court below.

forced virtually to cease doing business altogether, solely as a consequence of the Regional Director's failure to seek injunctive relief upon his finding of reasonable cause to believe that the charged violations of law had occurred.

On June 30, 1970, the Regional Director filed a Motion to Dismiss the amended Complaint, contending principally that his tardily-filed petition for injunctive relief rendered the proceedings moot. The Regional Director did not concede that he has acted improperly in any respect, did not concede that the use of the word "shall" in Section 10(l) imposed a mandatory duty of any kind on him, did not agree that he would proceed differently in the future should a similar situation arise involving Terminal or any other charging parties; on the contrary, the Regional Director's motion affirmatively alleged the propriety of his interpretation of the "mandatory" language of Section 10(l) to confer on him *discretion* as to whether or not to seek injunctive relief once he concludes the existence of "reasonable cause". It should be noted that while the Director claimed to possess the discretion under Section 10(l) to decline to seek an injunction when, in his subjective view, he deemed it unnecessary to do so, in this case he exercised that discretion in favor of seeking such relief—under the compulsion the amended Complaint—after the parties' dispute has been resolved and the picketing had ceased.

Since the Regional Director had, albeit tardily and under duress of a pending suit, petitioned for injunctive relief, on July 1, 1970 Terminal moved to dismiss that part of their amended Complaint which sought to compel him to do so; their suit for declaratory judgment was unaffected by this voluntary dismissal.[3]

3. Upon the filing of the Director's injunction petition, Terminal sought to clarify their status in the resulting district court proceedings. Accordingly, on July 1, 1970 Terminal filed a "Motion to Appear and Participate as Full Parties Litigant."

Throughout this period, the Director had carried on unilateral negotiations with the Union, resulting in a "Stipulation" which the Director's agents circulated to Terminal for their approval. The Director and the Union intended this Stipulation to serve in lieu of the injunctive relief for which the Director had earlier petitioned. To the end of achieving such an informal agreed settlement in lieu of the injunction which Section 10(l) commanded the Director to seek, the Director failed to seek an order to show cause which would have resulted in a hearing on the petition which he had filed.

Terminal—believing (i) that the remedial provisions of the Stipulation were inadequate; (ii) that they were entitled to participate fully, as parties, in the adjudication of their rights, including the determination of the effectiveness of any remedy and the right to present evidence to the court in the event of the Stipulation's breach,—rather than to be merely the unwilling recipients of an informal, inadequate, privately negotiated, non-self-enforcing Stipulation; and (iii) that the direction in Section 10(l) that the Director "shall" seek injunctive relief meant more than that the Director, having filed a petition under legal duress, may thereafter ignore his petition as if it has never been filed at all—filed specific and detailed objections to the proposed Stipulation.

On July 8, 1970, the district court disapproved the proffered Stipulation but held that Terminal did not constitute a party to the Section 10(l) proceedings and would not be allowed to intervene, although they were permitted certain lesser rights, including the right to be informed of all actions taken in the case and to be present by counsel at all hearings. The court also set the matter for hearing, on its own motion, for July 15, 1970.

However, on July 9, 1970, representatives of the Director

and the Union proffered an amended Stipulation to the district court judge in his chambers. The judge approved that Stipulation without Terminal's presence, without any advance notice to them that such a meeting was to be held, without affording them an opportunity to participate in the drafting of the document, without curing the defects previously protested, and without affording them an opportunity to state any further objections to it. Terminal learned of the meeting and the court's approval of the amended Stipulation only after those events had transpired. Moreover, the court's approval of that Stipulation had the effect of cancelling the scheduled hearing of July 15, preventing Terminal from filing prepared Interrogatories and from submitting evidence to the court, either in support of the Director's still pending petition for injunctive relief or for other relief which they deemed necessary to protect their vital and legitimate interests. Finally, the court's action violated its own order of July 8, which guaranteed Terminal the right to notice of all proceedings in the case and the right to participate therein, and violated their right, expressed in Section 10(l), to a hearing at which they could "appear by counsel and present any relevant testimony" in connection therewith.

The district court's decision denying Terminal the right to participate as full parties-litigant or, alternatively, to intervene in the district court proceedings was appealed to the Eighth Circuit which, on March 12, 1971, affirmed the decision of the district court. *Solien* v. *Misc. Drivers Local 610*, 76 LRRM 2780. A writ of certiorari was sought and denied on July 7, 1971. (No. 1588, October Term, 1970.) A Petition for Rehearing in that case is being filed concurrently with the instant Petition for writ of certiorari.

On July 2, 1970, the Regional Director formalized his conclusion that the Union had committed the charged viola-

tions of law by issuing an administrative "Complaint and Notice of Hearing".[4]

On December 9, 1970, the district court rendered its decision in the instant matter, granting the Regional Director's Motion to dismiss Terminal's suit for declaratory judg-

4. Having failed to seek the statutorily required interim injunction relief provided in Section 10(1), the Board then sought to dispose of the underlying case by means of a "Settlement Stipulation" purporting to remedy the charged unfair labor practices. A document so entitled was submitted to Terminal and Sears, Roebuck and Co., joint charging parties, on about July 24, 1970, bearing the signatures of agents of both the Union and the Director. The charging parties opposed such a disposition of their charges on the grounds that they lacked adequate information to judge whether all the substantive violations had been remedied, that they had not been afforded any opportunity to participate in the negotiation and drafting of this proposed settlement, and that the document lacked any findings of fact such as are required under Section 10(c) of the Act and without which it would be impossible to determine whether any resumption of the Union's picketing would violate the presumed proscriptions of the settlement.

In order to prevent the Director's approval of the settlement over the charging parties' objections, on July 17, 1970, the charging parties filed a complaint in the district court alleging that the Director had violated their rights under the Act and the Board's Rules and Regulations by excluding them from settlement discussions and depriving them of essential facts in connection with settlement deliberations in the underlying agency proceedings in which they are expressly made "parties", and sought to enjoin the Director from approving any settlement or engaging further in settlement discussions without the informed participation of the charging parties.

On July 30, 1970 the district court sustained the Director's motion to dismiss the cause for lack of jurisdiction. The charging parties thereafter filed an appeal of the district court's decision in the Eighth Circuit (Nos. 20462, 72). These appeals have been briefed and argued and have been pending before that court for over seven months.

There has been no final adjudication of the underlying dispute by the Board in any of these cases all of which arose out of the same secondary boycott activity by the Union; the Board has agreed to stay its appellate consideration of the Settlement Stipulation executed by the Director and the Union in the administrative proceedings pending the Eighth Circuit's decision in Nos. 20462, 72

ment on the grounds that the Director's ultimate filing for injunctive relief rendered the proceedings moot and, further, that a declaration of the validity of the challenged Field Manual provision was inappropriate in the absence of the General Counsel as a party-defendant.

The district court's decision was appealed to the Eighth Circuit which rendered its opinion on June 18, 1971 vacating the lower court's judgment and declaring the nature of the Director's duty under Section 10(l).[5] The Circuit Court held that while the Director's duty was in fact "mandatory" he nonetheless retained the discretion, customarily reserved to those who serve a "prosecutional" or "enforcement" function, to refrain from doing "useless" acts.

Terminal contends, however, that Congress intended to divest the Board's agents of such discretion when it created a duty which it repeatedly described as "mandatory"; that Congress determined, in connection with secondary boycotts, that the harm which could be avoided by uniformly requiring the seeking of injunctive relief where a prior finding of "reasonable cause" had been made was of greater significance than the avoidance of whatever administrative burdens, if any, which might therefore be created; and that the exercise of discretion sanctioned by the court below is a product of the court's invention without support in the statute itself, its legislative history, or any decided authority.

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5. The lower court's decision also permitted an expanded participatory role for charging parties in Section 10(l) proceedings. This portion of the court's opinion is not involved in the instant petition but is of substantial significance in the Petition for Rehearing in *Sears, Roebuck and Co., et al.* v. *Solien*, No. 1588 October Term 1970, which is being filed concurrently.

REASONS FOR GRANTING THE WRIT.

Congress has recognized that the secondary boycott is a particularly devastating economic weapon, destructive to the free flow of commerce and placing in jeopardy all business relationships of the neutral parties who become subject to it. Accordingly, Congress not only outlawed such conduct but provided, in Section 10(l), a unique remedy which reflected its grave concern that the law should make available the most effective and meaningful means for assuring the discontinuance and preventing the resumption of that conduct. Unlike any other provisions in the Act Congress required in Section 10(l) that the Board's agents give the investigation of charges of unlawful boycott activity priority over all other charges and created a mandatory duty on such agents, through the use of the imperative "shall" to seek temporary injunctive relief upon a showing of reasonable cause to believe the charges are true. Accordingly, the question as to whether the injunctive remedy provided in Section 10(l) is being interpreted and employed in a manner which affords the protection intended by Congress becomes an exceedingly important question in the administration of the Act and the administration of justice in the Federal courts. That importance is underscored by the fact that the court below, recognizing that this troublesome question will continue to arise, agreed to decide it by way of declaratory judgment despite the Director's claim that the matter was moot.

In the instant case Terminal was unlawfully, devastatingly and unnecessarily picketed for nearly two weeks after the Director had found the required "reasonable cause" because the Director believed he retained the discretion to withhold the seeking of injunctive relief pending his efforts to achieve voluntary settlement.

The instant case presents for judicial scrutiny for the first time the question of the precise nature of the duty imposed by Congress upon the Board's agents in Section 10(l), whether they in fact have discretion to withhold the seeking of injunctive relief where unlawful boycott activity is believed to have occurred, and whether the injury suffered by Terminal herein need ever be repeated. The need to secure such determination is highlighted by the facts (1) that the number of unfair labor practice charges filed with the Board which allege conduct for which Section 10(l) affords an injunctive remedy are both numerous in themselves and constitutes an increasing percentage of the total charges filed;[6] and (2) the Board's current practice is to seek injunctive relief in only about 25% of the cases in which the Board's agents find reasonable cause to believe charges of unlawful boycott activity are true. (App. A8, 9)

With respect to the merits of the substantive issue posed here, analysis of the legislative history of Section 10(l), the language of the statute and decided analogous judicial opinion reveals that Congress did not intend the provisions of Section 10(l) to be interpreted to permit the Board's agents to exercise discretion in meritorious cases to decline to seek injunctive relief.

A. The Statutory Language.

The language of Section 10(l) is clear and unambiguous. Congress has required therein, upon the Director's conclusion that the enumerated prohibitions against unlawful strikes and boycotts have been breached, that he "*. . . shall* petition any district court . . . for appropriate injunctive

6. Of the total unfair labor practice charges filed against unions during the Board's fiscal year 1969, over 2100 charges, or 32%, involved alleged violations of Section 8(b)(4). This represents an increase of 13% over the 8(b)(4) charges filed in fiscal 1968. *Thirty-fourth Annual Report of the National Labor Relations Board*, p. 13 (1969).

relief . . .". Congress provided no qualifications or exceptions regarding this explicit direction; no provision was made for the exercise of any administrative discretion predicated upon the existence of any alleged "expertise". Congress' refusal to incorporate any such exception supports the conclusion that its use of "shall" rather than "may" was deliberate.

The fact that Congress was competent to permit administrative discretion when it desired to do so is established, for example, by comparing the terms of Section 10(j) with those of 10(l). Each of these Sections authorizes the Board's agents to secure extraordinary injunctive relief in aid of aggrieved charging parties. They differ in that 10(l) addresses itself to violations of law involving unlawful boycotts and strikes while 10(j) affords potential injunctive relief from all other recognized violations of the Act. Whereas Section 10(l) provides that the Board's agents "*shall petition*", 10(j) states only that "*the Board shall have power . . . to petition*".

Thus, Congress created a deliberate statutory distinction between the nature of the duty it imposed on the Board's agents in these two Sections which were drafted, debated and enacted together in the 1947 amendments to the statute. The basis for this distinction was Congress' belief that the level of harm occasioned by the strikes and boycotts which constitute the subject matter of Section 10(l) was so inherently great that, as a matter of policy, they should uniformly be enjoined.

> "Section 10(l) reflects a Congressional determination that the unfair labor practices enumerated therein are so disruptive of labor-management relations and threaten such danger of harm to the public that they

should be enjoined whenever a district court has been shown reasonable cause to believe in their existence . . .'"[7]

Accordingly, Congress' use of the term "shall" in Section 10(l) should be considered to have been deliberate. The Federal courts have not hesitated in the past to require the Board to abide by the command of that term on the basis that Congress did not employ it inadvertently. For example, in a recent case arising in the Sixth Circuit, the Board claimed, as it does here, that despite the provision in Section 10(c) of the Act that ". . . the Board *shall* state its findings of fact and *shall* issue . . . cease and desist [orders] . . .", the Board nonetheless retained "discretion" not to do so in circumstances it deemed appropriate.[8]

The Court disagreed with the Board, noting Congress' use of "shall", and treated the quoted direction as mandatory.

In sum, given the deliberate distinction which Congress created between Sections 10(l) and 10(j), an interpretation of the unqualified mandatory language of 10(l) to permit the Director's exercise of discretion distorts the statutory scheme, blurs the purposeful distinction between the Sections, and is inconsistent with Congress' desire to afford, in 10(l) the surest relief from the effects of unlawful boycott activity.

B. The Legislative History.

Pertinent legislative history reveals that the discretion which the court below read into Section 10(l) was neither intended by those who supported the measure nor understood to exist by those who opposed it.

7. *Retail Clerks Union, Local 137, et al.* v. *Food Employer's Council, Inc.*, 351 F. 2d 525 (CA 9, 1965).

8. *U. A. W.* v. *NLRB*, 427 F. 2d 1330 (CA 6, 1970).

The Senate Majority Report[9] described the intended effect of the Section:

> "Section 10(l) makes it mandatory upon the Board to petition for injunctive relief in the case of strikes or boycotts that are alleged to constitute unfair labor practices within the meaning of paragraphs (A), (B) and (C) of Section 8(b)(4). Moreover, cases of this type are to be given priority, and when the board agent charged with the investigation has reasonable cause to believe that the charge is true and that a complaint should be issued, *he is required to petition the district court for appropriate injunctive relief* pending final adjudication by the Board." (Emphasis added.)

Neither the Report nor any portion of the debates which preceded it makes any reference to the possession of any discretion in the Board's agents,—whether they function in a "prosecutional" or "enforcement" capacity or otherwise.

Similarly, one of the principal objections of those who opposed the enactment of Section 10(l) was its "immediate requirement of a mandatory injunction."[10]

No evidence appears to indicate that the minority considered the mandatory nature of the Section to be conditioned by the existence of some form of reserved "prosecutional" discretion. Indeed, Senator Morse, who sought to compromise the various absolutist views expressed in the debates, appears also to have understood the end result of those debates to have produced an unqualified obligation on the Board's agents to act:

> ". . . the Board would be required . . . to seek injunctive relief. . . . While I acquiesced in this latter provision when it was added to the bill, I may say that I did so rather reluctantly. That is an example of my

9. Senate Report No. 105, 80th Cong., 1st Sess. (1947) at 27.

10. Senate Minority Report No. 105, pt. 2, 80th Cong., 1st Sess. (1947), at 19.

willingness to enter into reasonable compromise in committee. I did so believing that the best procedure would have been to make it discretionary, rather than mandatory, for the Board to seek injunctions."[11]

Additional support for the unqualified nature of Section 10(l), as enacted, derives from the treatment which Congress accorded to jurisdictional disputes. In enumerating those strikes which were subject to the mandatory coverage of Section 10(l), Congress omitted reference to strikes over jurisdictional disputes. The reason for this purposeful omission was stated in Senate Majority Report 105, *supra*:

> ". . . In the case of strikes and boycotts involving jurisdictional disputes, the same procedure may be used if appropriate; injunctive relief in such cases is made discretionary because it is anticipated that the separate machinery provided in 10(k) for settling such disputes will generally suffice."

It seems apparent, therefore, that if the right to exercise discretion in the granting of injunctive relief is accomplished by *removal* of the subject matter from the coverage of Section 10(l), that *inclusion* within that coverage eliminates the Board's right to exercise any such discretion.

The disputes of 1947 concerning the Board's mandatory duty under 10(l) to seek injunctive relief erupted again during the 1959 deliberations on the Landrum-Griffin amendments to the Act. Senator Morse criticized those amendments precisely because they *failed* to effect changes in Section 10(l) which, had those changes been made, would have produced the result which the court below judicially created. At 105 Cong. Rec. 17881, 86th Cong., 1st Sess. (1959):

> "The Taft-Hartley Act provided a mandatory injunction procedure whenever a violation occurred. In many

11. 93 Cong. Rec. 4840 (1947).

> instances, the equities of the situation suggested that the injunction procedure was not appropriate. A mandatory injunction procedure was not applicable to unfair labor practices committed by employers, and yet equally irreparable hurt to the rights of employees are daily committed, and remedied, if at all, after many months and years of litigation. The manifest unfairness of these quite divergent procedures suggest strongly a need for revision in the basic law. Unfortunately, the Landrum-Griffin bill and the conference report, like it, made no such revisions."

And again, at 17885:

> "The bill now before us is a further extension of the mandatory injunction device against labor."

In order to eliminate the "mandatory" nature of the duty imposed by Section 10(l) upon Regional Directors to petition for injunctive relief, and in order to confer specifically upon those Regional Directors discretion which they were understood to lack under Section 10(l), Senator Morse proposed the following amendment to Section 10(l), at 17881:

> ". . . in the second sentence after the words 'he shall', insert: '*if under all the circumstances equitable relief is appropriate*,' . . . Provided further, that where there is a failure to seek such appropriate relief the Board shall promptly make public the reasons for such failure.'" (Emphasis added)

Thus, this proposed amendment was intended both to confer discretion to determine whether injunctive relief should be sought and to provide a safeguard against the abuse of that discretion in the requirement for publication of reasons for failing to exercise it. Congress' refusal to adopt this proposal, therefore, evidenced its continuing belief in the wisdom of *denying* any such discretion to the Board's agents under Section 10(l) and of *requiring* them

to seek injunctive relief whenever reasonable cause is found to believe that charged unlawful strikes and boycotts occurred. The "appropriateness" of the injunctive remedy in any given case was left for the *courts* to decide, not the Board's agents.

The same conclusion follows from an analysis of a study of the Board and its procedures authorized in 1961 by the Committee on Education and Labor of the House of Representatives and conducted by its Subcommittee on the National Labor Relations Board. That Subcommittee released a series of reports on the various aspects of its investigations which were summarized in a statement by its chairman, Rep. Pucinski of Illinois, which provided:

> "This subcommittee further finds that the statutory provisions requiring, *automatically*, that the 'officer or regional attorney' seek a court injunction whenever he has reasonable cause to believe a 'charge' is true and that a complaint should issue, has resulted in hardship in many situations. The subcommittee, therefore, recommends that the statute be amended so as to give the Labor Board officials opportunity to exercise their discretion in whether or not to petition for the issuance of a court injunction." (Emphasis added)
>
> (Subcommittee of the NLRB of the House Committee on Education and Labor, Report from Hearings on the Administration of the Labor Management Relations Act by the NLRB, 87th Cong., 1st Sess. 29 (Comm. Print 1961); summary at 107 Cong. Rec. 21588, 89, 87th Cong. 1st Sess.).

The Subcommittee's recommendation was premised, *inter alia*, upon the testimony of former Board member Gerald Reilly who suggested that Section 10(l) be amended so that a petition for temporary relief be filed only "where there is reasonable cause to believe that a continuing unfair labor

practice will cause irreparable injury."[12] (Transcript of Hearings before the Subcommittee on NLRB of the Committee on Education and Labor, House of Representatives, 87th Cong. 1st Sess., 1961 (part 1), at page 766.)

These various proposals, which echoed those previously made by Senator Morse, were similarly not adopted by Congress. Their failure of adoption reveals only that while there has existed some Congressional support for the exercise of discretion by the Board's agents to petition for injunctive relief only when they believed such relief to be appropriate or necessary that the Congressional majority intended the matter of appropriateness or need to be decided by the courts, following the mandatory filing of the injunction petition.

Thus, the decision of the court below finding such discretion to exist constitutes a judicial amendment of Section 10(l) which Congress itself has repeatedly declined to effect.

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12. Mr. Reilly also testified that

"Under the present act it is mandatory upon a regional director to seek injunctive relief *where secondary boycott charges have merit.*" (Emphasis added.)

No reference was made by this former Board member to any additional requirement for the operation of the mandatory duty imposed by Section 10(l), nor any qualification of the term "mandatory."

C. Decided Judicial Authority Interpreting Analogous Mandatory Provisions of the National Labor Relations Act: The Court Below Creates a Conflict in Statutory Construction.

Although the instant case is one of first impression,[13] other courts have been called upon to interpret the nature of different "mandatory" provisions in the Act and to determine whether, as the Board had uniformly claimed, they possessed some reserved discretion despite the unqualified nature of the statutory duty imposed. Thus, the Board's contentions in those cases were identical to the holding of the court below. However, in none of the other situations was the Board's contention upheld, so that the decision below represents a conflict with each of the following authorities.

In *Templeton et al.* v. *Dixie Color Printing Co., Inc. and NLRB*, ... F.2d ..... (CA 5, No. 29921, May 26, 1971), the Board argued that it should not be held to have violated an express statutory duty when its challenged conduct was taken pursuant to a policy or practice which is alleged to have independent merit. The Board presumably sought to rely on a reserved or inherent right to exercise discretion pursuant to its prosecutional or quasi-judicial function. In response to this contention the court held that the Board's policy considerations do not supersede the express mandate of Congress. Accordingly, the requirements of Section 9(c)(1) of the Act (29 U. S. C. Sec. 159 (c)(1)) that "*whenever* a petition shall be filed . . . the Board *shall* investigate . . . *shall* provide for an appropriate hearing . . .

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13. In *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525, 530 (CA 9, 1965), the court held, in a somewhat different context, through without any qualification, that

> "the Regional Director's duty to seek an injunction when he has reasonable cause to believe that one of the sections of the National Labor Relations Act has been violated is *mandatory*."

(and) *shall* direct an election . . ." were held to preclude the Board from holding the petition in abeyance because of the pendency of other charges, to the detriment of those for whose benefit and protection the statutory provision was enacted.

In so deciding, the Fifth Circuit followed the precedent of other courts in which the Board similarly sought insulation from adherence to express statutory requirements for what were alleged to be similar "good reasons". *Leedom v. Kyne*, 358 U. S. 184 (1958) (the Board sought to ignore the statutory direction that it "*shall not*" certify a unit of professionals and non-professionals without affording the professionals an opportunity to vote on such an inclusion for the "good reason" that the non-professionals there constituted a small minority of the total combined unit); *Miami Pressmen's Local 46 v. McCulloch*, 322 F. 2d 993 (CA DC, 1963) (the Board sought to ignore the statutory direction that "it *shall* direct an election . . . and *shall* certify the results . . ." for the "good reason" that it was sure any such certification would subsequently be set aside by the courts); *UAW v. NLRB*, 427 F. 2d 1330 (CA 6, 1970) (the Board sought to ignore the statutory direction that it ". . . shall state its findings of fact and *shall* issue . . . cease and desist (orders) . . ." for the "good reason" that the issues involved were said to be of *de minimis* consequence whose resolution would not affect the outcome of the case).

In the instant matter, the court below, by declaring the right of the Board's Regional Director to condition his duty to obey the mandatory statutory direction that he "*shall*" petition for injunctive relief for the alleged "good reason" that in some instances no such relief against the possible resumption of illegal conduct was needed, seeks to sanction a claim of privilege from adherence to statute which has been uniformly denied by other courts.

D. The Arguments of the Court Below Lack Merit.

The court below, in asserting the existence of a "prosecutional discretion" as modifying Congress' mandatory directive, has created an exception to statutory language which is without cited support in either legislative history or the decisions of any other tribunal. Instead, the court relies for its conclusion on the language of Section 10(1) which provides that where the Director (or other appropriate Board agent)

> "has reasonable cause to believe such charge is true and that a complaint should issue, he shall . . . petition . . . for appropriate injunctive relief. . . ."

The court interprets the reference to the Director's belief that a complaint should issue as constituting an independent decision within his discretion which, until he exercises it, postpones the mandatory duty to seek injunctive relief. While the court limits the area of that discretion to the avoidance of "useless acts," nonetheless the entire argument is untenable.

First, the language of Section 10(1) has not been amended since its adoption and, indeed, the specific terms on which the court relies were included in the committee bill which ultimately came to vote. Yet, no legislator had ever referred to the language relied upon by the court below as conferring any authority on the Board's agents to qualify the obligatory duty otherwise imposed. It is not conceivable that such a legislative intent would not have formed a prominent part of the debates since the nature of the duty imposed on the Board's agents was a matter of such heated controversy.

Rather, and in accord with this legislative history, it would appear logically unavoidable that the language in Section 10(1) which provides that a petition must be filed

upon a finding of "reasonable cause to believe such charge is true and that a complaint should issue" involves only a single decision by the Regional Director, rather than two independent decisions, as the Director claims herein. A finding of the requisite "reasonable cause" carries with it the concurrent and consequential finding that a complaint should issue to remedy the charged violations. It may well be that conditions subsequent may dictate that the complaint is unnecessary, as where the violations cease and the parties adjust their dispute. However, the fact that *subsequent* developments render the filing of a complaint unwarranted and unnecessary does not mean that *at the time* the Regional Directors *initially* finds the existence of violations of law he does not necessarily also conclude that a remedial complaint *should* issue.

This interpretation does not render the "and that a complaint should issue" language superfluous. For it may well be that in certain circumstances the nature of the unlawful conduct uncovered by the Board might be so isolated or *de minimis* as to persuade the Board not to seek any remedy at all. Such a finding by the Board is equivalent to concluding that no violation of law had occurred and in such cases, of course, no complaint would issue. But once the Board determines that the violations found are of significant magnitude to warrant its remedial attention in any form or degree then, of necessity, a complaint should issue. Therefore, the only question which is to be decided by the Board's Director, prior to the exercise of the mandatory duty imposed by Section 10(l), is whether the alleged unlawful conduct should become subject to any Board process at all. If so, then injunctive relief must be sought whether or not the unlawful conduct may already have ceased; unlawful conduct worthy of remedy is worthy of being enjoined, according to the Congressional scheme and Congress deliberate effort to distinguish the duties imposed in 10(l) from those in 10(j).

Second, the view of the court below that the Director should be permitted to determine when relief is "useless," —even assuming the dubious relevance of this value judgment in the Congressional scheme—permits the Board to exercise rights which Congress reserved for the courts. The decision as to whether an injunction should be granted is properly for the district courts. The mandatory nature of Section 10(l) was designed only to assure that the Director would put before the courts, *for the courts' evaluation*, the facts establishing reasonable cause and the basis for seeking relief. However, the lower court's view would permit the Board's agents to place before the courts only those meritorious cases in which they had additionally made an evaluation (as opposed to investigation) which properly is a judicial function. The Board urged the propriety of such a result to the Ninth Circuit in *Retail Clerks*, *supra*, and earned the following response from that court:

> "It is not for the Regional Director to substitute his own ideas of how best to deal with alleged unfair labor practices for those of Congress."

Moreover, the belief of the lower court that it is a "useless" act to enjoin conduct which has ceased is suspect. It is impossible for any Board agent to know whether unlawful conduct which was discontinued following the filing of charges will thereafter be resumed. An injunction has value not merely because it results in cessation of unlawful acts but equally because it affords protection against their resumption, because it constitutes also a deterrent to others, and because it offers guidance to parties who differed honestly as to the legality of a particular form of picketing conduct. Contrary to the lower court's view, to enjoin a discontinued secondary boycott may be no more "useless" than any suit for declaratory judgment or the practice of preventive medicine. A more appropriate assessment of

this issue was rendered by the court in *NLRB* v. *General Motors Corp.*, 179 F. 2d 221 (CA 2, 1950):

> "The defendant in an action for an injunction never as a matter of right becomes entitled to a dismissal because after process served, he discontinues the conduct of which the plaintiff complains. It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law already condemned, the court shall forbid; and the fact that its judgment adds to existing sanctions that of punishment for contempt, is not a circumstance to which a court will ordinarily lend a friendly ear. The defendant on his part can invoke no other interest except an escape from whatever stigma attaches against him, and to the court's refusal to accept his promise that he will not repeat the wrong. Ordinarily, that will not be a counterweight to the protection of which the plaintiff has shown he was once in need, and which he will need again should the defendant change his mind."

CONCLUSION.

For the foregoing reasons, and in reliance upon the authorities cited, it is urged that the instant Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 71-1042.

TERMINAL FREIGHT HANDLING CO., and TERMINAL FREIGHT CO-OPERATIVE ASSOCIATION,
Plaintiffs-Appellants,
vs.
JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 18, 1971]

Before MATTHES, *Chief Judge*, GIBSON, *Circuit Judge* and HENLEY, *District Judge.**

GIBSON, *Circuit Judge.*

The plaintiffs-appellants seek a declaration of the duty of a Regional Director under the National Labor Relations Act, as amended, 29 U. S. C. §151 et seq., to file a petition in the district court for injunctive relief when

* Chief Judge, United States District Court, Eastern District of Arkansas, sitting by designation.

that Director has found reasonable cause to believe that a secondary boycott charge is true. Section 10(l) of the National Labor Relations Act, 29 U. S. C. § 160(l), provides in effect that an appropriate official, in this case the Regional Director, shall make an investigation of complaints of alleged unlawful secondary boycott activity, and, should he find "reasonable cause to believe" that such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any [appropriate] United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter."[1]

The plaintiffs (hereinafter collectively referred to as "Terminal") originally filed a complaint for a mandatory injunction requiring the defendant Joseph H. Solien, Regional Director of the Fourteenth Region of the National Labor Relations Board, to petition for temporary injunctive relief against the Union's[2] allegedly unlawful second-

1. Section 10(l) provides in pertinent part:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [paragraph (4)(A), (B), or (C) of section 158(b), 158(e) or 158(b)(7)], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law . . . ."

2. Miscellaneous Drivers and Helpers Union, Local No. 610, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereafter referred to as "Teamsters Local 610" or "Union."

ary boycott activity pending final adjudication of Terminal's unfair labor complaint filed with the Board. This complaint was amended to include a prayer for declaratory relief with respect to what discretion, if any, the Regional Director had under the circumstances here posited. The District Court sustained a motion to dismiss on the ground of mootness and also on the ground of failure to join an indispensable party.

The rather complex factual situation of this controversy has already been before this court in a different context and is discussed in *Solien* v. *Miscellaneous Drivers and Helpers Union, Local 610*, ___ F. 2d ___ (8th Cir. Nos. 20407 & 20418, March 12, 1971) (hereafter referred to as "*Solien I*"). There are also other aspects of this controversy now pending before us.[3] A brief recital of the factual situation underlying the issues presented in this appeal is in order.

On June 12, 1970, Terminal filed an unfair labor practice charge with the Board alleging that Teamsters Local 610 was engaging in a secondary boycott in violation of § 8(b)(4)(B), 29 U. S. C. § 158(b)(4)(B). On June 16 the Board's Regional Director, Joseph H. Solien, determined there was reasonable cause to believe that the charge was true, and that in the absence of a cessation of the unlawful picketing, a complaint should issue. The Regional Director did not at that time issue a Board complaint or petition the district court for a § 10(l) injunction because on June 18 he received written assurance from the Union that it had altered its picketing to conform to the *Moore Dry Dock*[4] standards for determining the legality of "common situs" picketing and an offer of a proposed

3. *See* footnote 6, *infra*.

4. *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N. L. R. B. 547, 549 (1950). *See also Local 761, Elec. Workers* v. *NLRB*, 366 U. S. 667, 676-677 (1961).

informal settlement agreement executed by the Union. At the request of Terminal the Regional Director deferred consideration of the proposed settlement while he further investigated the Union's picketing.

On June 19, Terminal filed a complaint for an injunction to compel the Regional Director to petition for an injunction pursuant to § 10(l). Terminal's complaint was amended on June 26 to also seek a declaratory judgment (1) that the Director's refusal to petition for a § 10(l) injunction violated the "shall petition" command of § 10(l), and (2) that § 10230 of the Board's Field Manual, which allegedly authorizes Regional Directors to exercise discretion in petitioning for § 10(l) injunctions, is likewise violative of § 10(l).

After further investigation the Regional Director came to the conclusion that the Union's picketing still had a secondary nature. Thus, on June 29 he petitioned the United States District Court for the eastern District of Missouri for a temporary injunction pursuant to § 10(l)[5] and on July 2 he issued an unfair labor practice complaint against the Union. The Union's primary dispute, however, had been resolved on June 27 and all picketing ceased on June 29. Terminal thereupon dismissed its complaint only insofar as it sought to compel the Regional Director to petition for injunctive relief.

The District Court, Judge John K. Regan, dismissed the complaint on the grounds that the Director's June 29 petition for injunctive relief rendered moot Terminal's

5. In the § 10(l) proceeding the district court approved on July 9 a settlement stipulation in lieu of injunctive relief, which had been executed by the Regional Director and the Union over the objection of the charging parties. The charging parties thereupon appealed to this Court from the district court's order denying them full party status in the § 10(l) proceeding. This Court affirmed the district court's order in *Solien* v. *Miscellaneous Drivers & Helpers Union, Local 160*, ... F.2d ..... (8th Cir. 1971).

claim that the Director's refusal to petition for injunctive relief violated § 10(l), and that a declaration as to the validity of § 10230 of the Board's Field Manual was inappropriate in the absence of its promulgator, the General Counsel, as a party-defendant.

On July 24, over the objections of the charging parties, the Regional Director and the Union executed a formal settlement agreement with regard to the underlying unfair labor practice complaint, which settlement agreement provided for the entry of a Board order and a court of appeals' decree enforcing the order.[6] The General Counsel approved this settlement on March 19, 1971, and has submitted it to the Board.

JUSTICIABILITY.

There is a threshold question of subject matter jurisdiction. The Regional Director argues that § 3(d) of the Act, 29 U.S.C. § 153(d),[7] makes clear that the General

6. On July 17 the charging parties had filed a complaint in the district court alleging that the Director had violated their rights under the Act and the Board's rules and regulations by excluding them from settlement discussions and depriving them of essential facts in connection with settlement deliberations and sought to enjoin the Director from approving any settlement or engaging further in settlement discussions without the informed participation of the charging parties. The action was dismissed by the district court for lack of jurisdiction over the subject matter. Terminal's appeal from the district court's judgment has been briefed and argued and is presently pending decision by this Court: *Sears, Roebuck and Co., et al.* v. *Solien*, ... F.2d ..... (8th Cir. Nos. 20462 and 20472 ..... 1971).

7. Section 3(d) provides in pertinent part:

"The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the

Counsel is the final authority in all matters affecting the Board's prosecutorial machinery, including the Regional Director's determination of whether to institute a § 10(l) proceeding, and that the Director's determination in this regard is subject to review only by the General Counsel and not by the courts. It is correctly pointed out that the federal Declaratory Judgment Act, 28 U. S. C. § 2201, does not confer jurisdiction but rather provides an additional remedy where jurisdiction already exists. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 671-672 (1950).

In *Meekins, Inc.* v. *Boire*, 320 F. 2d 445 (5th Cir. 1963), the charging parties sought to enjoin a regional director from refusing to petition the district court for § 10(l) relief. The Fifth Circuit affirmed the district court's dismissal because the charging parties failed to exhaust their administrative remedies in not seeking review under 29 C. F. R. § 102.19.[8] The critical factual difference between *Meekins* and the instant case is that the regional director in *Meekins* did not find there was reasonable cause to believe that the secondary boycott charge was true. Since the Director in the instant case found that there was reasonable cause to believe the charge was true, the question squarely presented is whether the Director acted in excess of his statutory authority in refusing to issue a complaint and to petition for injunctive relief.

That the district court had jurisdiction under 28 U. S. C. § 1337 in the instant case to determine whether the Director's action exceeded his delegated powers was made clear in *Leedom* v. *Kyne*, 358 U. S. 184 (1958). *Leedom* held the district court had jurisdiction under § 1337 to determine whether the Board had exceeded its delegated powers and

prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

8. 29 C. F. R. § 102.19 provides a right to appeal to the General Counsel from the Director's refusal to issue a complaint.

acted contrary to a specific prohibition in the Act, reasoning that "[t]his Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190. Although a negative prohibition was involved in *Leedom*, the rationale has been held to be equally applicable when, as here, the Board or its agents act in disregard of an affirmative or mandatory command. In *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*, 332 F. 2d 993 (D. C. Cir. 1963), the Court held that § 9 (c)(1) of the Act requiring the Board to certify results of a representation election imposed a mandatory duty on the Board to certify an election in which the infirmity, if any, was in the Board's own procedure. The Court's answer to the Board's argument that *Leedom* applied only with reference to a negative prohibition vis-a vis a mandatory requirement is likewise dispositive of that issue in the instant case:

> "The language which the Supreme Court held had been violated was in terms of 'shall not,' words of prohibition. The provision with which we are here concerned, Section 9(c)(1), is in terms of requirement: 'If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballot and *shall* certify the results thereof.' (Emphasis added.) We are unable to read the Court's decision in Leedom v. Kyne as limited to the negatively-worded prohibition there involved. If, after the Board finds that a question of representation exists, and an election is held, the requirement that it 'shall' certify the results is mandatory, then a failure to so certify would be prohibited by the Act and in excess of the Board's powers. A party would be as aggrieved by such a failure as by an act of the Board contrary to an express prohibition." *Id.* at 997 (footnote omitted.)

We conclude that jurisdiction properly rested with the

district court under 28 U. S. C. § 1337. In so holding, we stress, as did the Supreme Court in *Leedom*, that the instant "suit is not one to 'review,' in the sense that term is used in the Act, a decision of the Board made within its discretion." 358 U. S. at 188.

We think this case is justiciable because there is a distinct possibility that the challenged activity will recur and that the challenging party will be affected should recurrence take place. *Solien I* (slip opin. at 5). *See also Carpenters' Union Local 1976* v. *NLRB*, 357 U. S. 93, 97 n. 2 (1958). In addition the controversy between these adverse parties still exists as to the authority or discretion of the Regional Director to refuse to file a petition for injunctive relief upon his finding that there is reasonable cause to believe that the secondary boycott charge is true. The Regional Director's contention that he has absolute discretion to file or not directly impinges upon Terminal's rights to be free of recurring secondary boycotts. The Director's position is diametrically opposed to Terminal's contention that the Director has no discretion whatever after making the necessary predicate findings under § 10(l). Thus, the extent of the charging party's rights under § 10(l) and the Regional Director's obligations thereunder are and will continue to be relevant each time a charge is filed alleging violations remedial under § 10(l).[9] "[F]urthermore, the policy of insuring judicial

9. Terminal has compiled statistics from data furnished by the Board under the Public Information Act, 5 U. S. C. § 552, which indicate that in perhaps three-fourths of the cases in which reasonable cause is found by a regional director, the regional director does not petition for injunctive relief. During the three-year period from 1968 through 1970, there were 30 cases in which unilateral settlement agreements as to the underlying unfair labor practice charges were effected between the Board and the unions charged with § 8(b)(4) violations *over the objections of the charging parties*. Of these 30 cases in which the regional director necessarily found reasonable cause and the charging parties were not satisfied with the settlements negotiated by the

review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness." *Solien I* (slip opin. at 6); *See United State* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953); *Moore* v. *Ogilvie*, 394 U. S. 814 (1969); *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498 (1911).

For these same reasons we reject the Director's contention that this case does not satisfy the "actual controversy" prerequisite to a determination under the Declaratory Judgment Act. There was clearly an actual controversy as of June 19 when the Director refused to petition for the injunction although he had found reasonable cause to believe the charge true three days earlier. His voluntary cessation of this conduct (by petitioning for a temporary injunction) on June 29 should not deprive the court of the power to hear and determine the case. *United States* v. *W. T. Grant Co.*, 345 U. S. at 632. The controversy still remains to be settled and the resolution of this case in its present posture will further two of the principal purposes for rendering declaratory judg-

regional director, the regional director petitioned for injunctive relief in only 8 cases (i.e. 26.7%).

The National Labor Relations Board's Thirty-Fourth Annual Report, for the fiscal year 1969, provides further support for Terminal's assertion that regional directors refuse to seek injunctive relief in approximately three-fourths of the cases in which they find reasonable cause. During fiscal 1969, 2656 cases were filed alleging violations contemplated within the relief afforded under § 10(l). Appendix A, Table 2, page 199, 34th Annual Report of the NLRB, CCH Labor L. Rep. No. 130 (Jan. 26, 1971). Of this total, settlement agreements were effected in 784 cases. *Id.*, Appendix A, Table 7, page 208. Of these 784 cases in which reasonable cause necessarily was found, § 10(l) relief was sought in only 190 cases. *Id.*, Appendix A, Table 20, page 238. Consequently, regional directors failed to petition for § 10(l) injunctive relief in 75.8% of these cases.

While these figures do not include cases in which regional directors may have petitioned for injunctive relief where an adjudication of the unfair labor practice was ultimately made, we note that the Board does not dispute these figures or the conclusion Terminal has drawn from them.

ments in that "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue" and "it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." E. Borchard, *Declaratory Judgments* 299 (2d ed. 1941). *See also Gordon* v. *Bowles*, 153 F. 2d 614, 616 (Emer. Ct. App.), *cert. denied*, 328 U. S. 858 (1946).

Finally, we think the District Court erred in concluding that the General Counsel was an indispensable party to any determination of the validity of Board Field Manual § 10230. The determination of the validity of § 10230 is necessarily tied to our determination of the duty § 10(l) imposes on the Regional Director. Since § 10230 would clearly be invalid if we were to sustain Terminal's interpretation of § 10(l) that the Regional Director has a mandatory duty to petition for injunctive relief once he has determined there is reasonable cause to believe a secondary boycott charge is true, the General Counsel is not an indispensable party. While § 10(l) expressly provides that for purposes of initiating injunctive relief the Regional Director acts "on behalf of the Board," we are cognizant that the General Counsel has final prosecutorial authority and can override the Regional Director. *See McLeod* v. *Teamsters Local 239*, 330 F. 2d 108 (2d Cir. 1964). Nonetheless, the General Counsel is not an indispensable party since our decree could effectively grant the relief desired by expending itself on the Regional Director who is before the Court. *Williams* v. *Fanning*, 332 U. S. 490 (1947).

THE MERITS.

The Regional Director's position is that the duty imposed on him by § 10(l) of seeking appropriate injunctive relief becomes operative only after he has made two in-

dependent judgments. First, he must decide whether there is reasonable cause to believe the secondary boycott charge is true; if he so concludes he then must decide whether a complaint should issue. And the determination as to whether a complaint should issue is a matter within his discretion, subject to review only by the General Counsel under § 3(d) of the Act. Moreover, he contends other valid considerations, apart from the merits of the charges, may be significant elements in his decision and equally within the scope of discretion allowed the General Counsel under § 3(d).

Terminal claims that a literal reading of the statute indicates that upon the Director's determination that reasonable cause exists, a complaint must issue and the Director must necessarily petition for injunctive relief under the statutory command of § 10(l). In support of its position, Terminal points to the "shall petition" language of § 10(l) and argues that had Congress intended the decision to petition for injunctive relief to be discretionary even though reasonable cause has been found, it would have used language similar to the "shall have power * * * to petition" upon issuance of a complaint language of § 10(j), which affords potential injunctive relief from violations of the Act not included under § 10(l).[10]

The legislative history is of some assistance[11] and the

10. Section 10(j) provides in pertinent part:
"The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order."

11. The precise nature of the regional director's duty to petition for § 10(l) relief was not fully clarified in either the Congressional reports or the floor debates on the committee bill, which contained the present § 10(l) provisions in question here. The

comparatively clear distinction in the use of words in § 10(j) and § 10(l), which were drafted, debated and enacted together in the 1947 amendments to the Act, leads

only floor discussion of the meaning of § 10(l) at all relevant took place in the Senate floor debates on the Ball Amendment which would have permitted private parties to petition for injunctive relief. The Ball Amendment, of course, was subsequently defeated by a vote of 62 to 28. 93 Cong. Rec. 4847 (1947).

In the Senate floor debates, the proponents of the Ball Amendments, Senators Ball, Wherry, Donnell and Revercomb, took the position that the committee bill made it discretionary with the Board as to whether a temporary injunction would be sought against alleged secondary boycotts. 93 Cong. Rec. 4835-36, 4837, 4838 (1947). The supplemental views of Senators Taft, Ball, Donnell and Jenner to the Senate Majority Report were likewise critical of the proposed § 10(l) because it provided "a weak and uncertain remedy for those injured by clearly illegal strikes" as "[i]t depends upon the decision of the National Labor Relations Board as to whether any action shall be taken * * *." Supplemental Views of Senators Taft, Ball, Donnell and Jenner on S. 1126, Senate Report No. 105, 80th Cong., 1st Sess. (1947), at 54.

Of those opposing the Ball Amendment in the Senate floor debates Senator Morse and Senator Pepper took the position that the committee bill provided a mandatory injunction procedure, while Senator Smith indicated that a discretionary procedure was intended and desirable. 93 Cong. Rec. 4840, 4846, 4843 (1947). The Senate Majority Report, which merely repeats the pertinent statutory language, is not of itself very illuminating although it does speak of a mandatory duty on the Board to petition for injunctive relief. Senate Report No. 105, 80th Cong., 1st Sess. (1947), at 27. However, one of the main objections to the bill in the Senate Minority Report was "the immediate requirement of a mandatory injunction" in certain types of labor disputes. Senate Minority Report No. 105, pt. 2, 80th Cong., 1st Sess. (1947), at 19.

We are quite cognizant that the conflicting views set forth in these reports and remarks undoubtedly were due in part to the adversary context in which they were made. The issue of primary concern was whether the charging party could personally petition for a temporary injunction. Except for Senator Smith's remarks, the remarks made in opposition to the Ball Amendment painted the committee bill as providing a mandatory injunction procedure through the Board; whereas the remarks made in support of the Ball Amendment and the supplemental Majority Report contended that the procedure was wholly discretionary with the Board under the committee bill.

Consequently, while we view the Senate floor debates as not con-

us to conclude that Congress did create a deliberate statutory distinction between the nature of the duty it imposed on the Regional Director in § 10(l) and § 10(j).[12] Senate Report No. 105, 80th Cong., 1st Sess. (1947), also indicates that a definite distinction was intended. The Report explains that jurisdictional strikes were omitted from mandatory coverage under § 10(l) and placed under § 10(j), where injunctive relief "is made discretionary because it is anticipated that the separate machinery provided in 10(k) for settling such disputes will generally suffice."[13] *Id.* at 27.

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clusive in construing § 10(l), we do think the statements in both the Senate Majority and Minority Reports that a mandatory injunction procedure was intended are valuable indications of Congressional intent.

12. A plausible rationale for this distinction has been suggested by one commentator:

> "Evidently, these particular union unfair labor practices warranted the mandatory operation of section 10(l) because of their immediate injury to the public resulting from the union clash with an employer and his business whereas the remaining union unfair labor practices, which fall within the discretionary scope of section 10(j), directly affect employees and their relations with the union, with possible public injury more remote. Similarly, the absence of employer unfair labor practices from section 10(l) seems to be based on a policy judgment that the proscribed employer practices, unlike the enumerated union activities, do not so injure the public that normal Board remedies are inadequate."

Note, *Temporary Injunctive Relief Under Section 10(l) of the Taft-Hartley Act*, 111 U. Pa. L. Rev. 460, 463-464 (1963) (footnotes omitted). *See also* Comment, 56 Mich. L. Rev. 102, 104-105 (1957).

13. This distinction is also reflected in the remarks of Senator Morse of Oregon:

> "Under section 10(j) of the committee bill the National Labor Relations Board may in its discretion apply for a temporary restraining order where unfair labor practices have been committed, including, of course, the unfair labor practices which we are here discussing. Section 10(k) authorizes the Board to appoint arbitrators in jurisdictional disputes whose decision is

The Senate floor debates, which did not focus on the precise question before us, reveal a deep concern about the serious economic damage occasioned by secondary boycotts.[14] While a consensus agreed that there was a need for expeditious relief in such situations, the Senate was split on the question of whether the charging parties should be allowed to petition a district court directly for injunctive relief or whether the Board alone would have the power to initiate such injunction suits. The Ball Amendment, which would have permitted charging parties to petition the district courts directly for injunctive relief, was soundly defeated and a legislative compromise appears to have been struck.[15] To avoid the problem of employees forum-shopping and achieving an independent development of the law through their selection of theories of violation and relief, the right to initiate injunction suits was limited to the Board. In order to provide a meaningful remedy for employers faced with an injurious secondary boycott, the regional director[16] was required to investigate such charges forthwith, giving them priority over all other cases, and to seek injunctive relief when he finds reasonable cause to believe the charges are true.

to be final. Section 10(l) requires that with respect to secondary boycotts and jurisdictional strikes the regional attorney of the National Labor Relations Board shall petition for appropriate injunctive relief pending the final adjudication of the Board with respect to the case." 93 Cong. Rec. 4811 (1947). Jurisdictional strikes were subsequently deleted from the mandatory coverage of § 10(l) in its final form.

14. *See, e.g.*, 93 Cong. Rec. 4833-4847 (1947).

15. *Id.*

16. When we refer to the regional director, we include any other officer or regional attorney who may be included within the language of § 10(l).

subject to certain qualifications which we will discuss shortly.[17]

Although this is a case of first impression, the Ninth Circuit construed § 10(l) similarly in *Retail Clerks Union Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (9th Cir. 1965), though in a different context. The Court there held that a district court had the power to grant a § 10(l) injunction originally petitioned for by the regional director notwithstanding the fact that the latter had meanwhile entered into a stipulation with the respondent union which he believed obviated the need for injunctive relief. Although acknowledging that "it may be true that the Regional Director could not be compelled to institute proceedings under Section 10(l)", the Court stated that "the Regional Director's duty to seek an injunction when he has reasonable cause to believe that one of the sections of the National Labor Relations Act enumerated in Section 10(l) has been violated is *mandatory*." 351 F. 2d at 530 (footnote omitted.)

17. The remarks of Senator Morse on the floor of the Senate during the debate on the Ball Amendment reflect the nature of the compromise. As a substitute for the Ball Amendment, Senator Taft of Ohio had proposed that private parties be given the right independent of Board action to sue for damages resulting from unlawful secondary activity. Senator Morse stated:

> "I do want to make the additional argument against the Taft substitute that it makes it possible for two different district courts and the NLRB to be dealing simultaneously with the same subject matter. The Board would be conducting a hearing looking to a cease-and-desist order. At the same time, the Board would be required, as provided in the committee bill [in which the proposed § 10(l) was in substantially its present form], on which I will comment in a moment, to seek injunctive relief, which means that there would be two actions going on at the same time, or that there might be. While I acquiesced in this latter provision when it was added to the bill, I may say that I did so rather reluctantly. That is an example, however, of *my willingness to enter into reasonable compromise in committee. I did so believing that the best procedure would have been to make it discretionary, rather than mandatory, for the Board to seek injunctions.*" 93 Cong. Rec. 4840 (1947) (emphasis added).

It is our conclusion that Congress intended that the Regional Director must take immediate steps to investigate charges arising under § 10(l), and, upon making a reasonable cause determination, proceed *forthwith* to resolve the dispute. While we disagree with the Director's view that even after finding reasonable cause, he retains absolute discretion as to whether he should petition for a temporary injunction or issue a complaint, we do not feel the "and that a complaint should issue" language of the statute is superfluous or should be disregarded.

Generally those engaged in prosecutorial or enforcement activities are allowed a wide discretion and considerable latitude on when to file charges and against whom charges are to be filed. This is necessarily so for many reasons, some more obvious than others. The resources of those engaged in prosecutorial activities as well as the resources of all agencies of the Government and the country itself are not unlimited. Priorities must be established and the resources available utilized to carry out the primary object of the enforcement activity. Some violations are minimal and in the very nature of things are not worthy of the expense entailed in calling the parties to account. Often disputes are settled by agreement or negotiation and thus do not warrant a greater expenditure of public funds and manpower. Also, many decisions rest on marginal facts, requiring an assessment of the overall situation and background before a commitment of limited manpower can be channelled into enforcement activity. Therefore, it stands to reason that the Regional Director must possess some latitude on when, in his judgment, appropriate injunctive relief should be sought. However, this general prosecutorial discretion is neither absolute nor unfettered, and where an appropriate statute directs mandatory action, the prosecutorial discretion is thus narrowed and limited.

We, therefore, conclude the "and that a complaint should issue" phrase reflects Congress' intention that the regional director retain limited prosecutorial discretion once he has made a reasonable cause determination. We think it is clearly within his discretion to make an initial demand upon the union to cease its unlawful activity. However, if he is unable to secure cessation upon such summary demand and negotiation, he must then petition for temporary injunctive relief and issue a complaint (or vice-versa). The law does not and should not require the doing of useless acts. Rather than requiring the regional director to petition for injunctive relief in every case where reasonable cause is found, as Terminal contends Congress intended that the regional director retain a limited discretion so that he would not be required to perform the meaningless act of petitioning for injunctive relief when the union has already ceased the unlawful activity and it is unlikely that the conduct will resume, nor to proceed in a case where the acts complained of are so insignificant as to be unworthy of the Board's and the Court's attention.

The Director of course may still negotiate settlements in lieu of injunctive relief in cases in which he has petitioned for injunctive relief, such as was done here, and undoubtedly such settlements will be approved by the district court in most instances. *See Solien I.* If a settlement in lieu of injunctive relief negotiated by the regional director fails to adequately protect the public interest, the district court can override the settlement and grant injunctive relief. *Retail Clerks Union, Local 137 v. Food Employers Council, Inc., supra.*

Our construction of § 10(l) is in no way inconsistent with our decision in *Solien I.* While § 10(l) neither permits the charging party to initiate an injunction suit nor grants it party status in the injunction proceeding, it does

afford the charging party certain rights and imposes a duty upon the regional director to petition for injunctive relief if he is unable to secure cessation of the unlawful activity upon request or through summary negotiation, unless the matter presented is so insubstantial as not to warrant further action.

Notwithstanding our disagreement with the all-or-nothing argument made by the Board on the statutory construction question, we do not think the assailed § 10230 of the Board's Field Manual is at all violative of the Congressional mandate for affirmative action; but to the contrary is in aid thereof and consonant with our interpretation of § 10(l). In the first place, the Field Manual, as stated in the introductory paragraph § 10000, is not all inclusive or necessarily a compendium of when action shall be taken regarding unfair labor practice complaints.[18] In the second place, § 10230 expressly recognizes the mandatory nature of the Congressional command of § 10(l) and by implication directs that affirmative action be taken unless the proscribed activity has voluntarily ceased and a resumption thereof is not indicated. Section 10230 of the Field Manual reads:

> "Where there is reasonable cause to believe that a violation [of Sections 8(b)(4), 8(e) or 8(b)(7)] has occurred and that a complaint should issue . . .
>
> "Under that section injunction proceedings are

[18] Section 10000 states:

"This Manual is intended as a guide to the professional employee in the field with respect to case handling procedures. It is not intended as a compendium of the substantive law nor a substitute for a knowledge of the law.

"It is expected that the guidelines and instructions will be followed in the processing of Agency work. Recognizing, however, that no guidelines or instructions can fully anticipate the many and varied situations encountered by professional employees in their day-to-day work, the provisions and guidelines herein must be tempered in appropriate circumstances with responsible, professional judgment."

mandatory; however, if it appears that the union has voluntarily ceased engaging in the conduct and a resumption thereof is not threatened, . . . commencement of 10(l) proceedings *may be held in abeyance,* as our experience in the courts has demonstrated that they are unwilling to accept filings where the activity has ceased and there is no likelihood of resumption." (Emphasis added.)

This is in accord with our view of the regional director's obligation and duties under § 10(l).

Inasmuch as the complaint for injunction was dismissed by Terminal and the balance of this suit is concerned with a declaration of rights, this opinion shall serve as a declaration of rights of the parties and no further action is required by the trial court. Judgment of District Court is vacated and cause remanded with direction to file a copy of this opinion as a declaration of the rights of the parties. Two-thirds of costs assessed against the appellee and one-third against appellant.

IN THE UNITED STATES DISTRICT COURT.

(Caption—70-C-300(3))

MEMORANDUM AND ORDER.

This matter is before the Court on motion of defendant to dismiss plaintiffs' amended complaint and on motion of plaintiffs for partial dismissal.

The action, as originally filed on June 19, 1970, sought only a mandatory injunction to compel the Regional Director to petition the District Court for injunctive relief under Section 10(l) of the National Labor Relations Act, 29 United States Code, Section 160(l). It was alleged that on June 16, 1970, the Regional Director concluded, after investigation, that he had reasonable cause to believe that a union had engaged in unlawful secondary picketing as charged by plaintiffs on June 12, 1970 and that a complaint should issue, but that on June 18, 1970 the Regional Director indicated to plaintiffs that Section 10(l) relief would not be sought. The theory of the action was that by failing to seek injunctive relief under Section 10(l), the Regional Director failed to perform his statutory duty, to the irreparable damage of plaintiffs.

The amended complaint, filed June 26, 1970, sought, in addition to a mandatory injunction, a declaratory judgment, (1) that plaintiffs since June 18, 1970, are entitled to the mandatory relief sought and (2) that Section 10230 of the Field Manual of the National Labor Relations Board is unconstitutional, unauthorized by law, and of no force and effect. The foregoing section of the field manual, although expressly stating that injunctive proceedings are mandatory if the proscribed union conduct is found, authorizes regional directors to hold such proceedings in abeyance "if it appears that the union has voluntarily

ceased engaging in the conduct and a resumption thereof is not threatened, so that there may be nothing to enjoin . . . as (the Board's) experience in the courts has demonstrated that they are unwilling to accept filing where the activity has ceased and there is no likelihood of resumption. In the latter event, injunction proceedings should be instituted if it thereafter appears that resumption is imminent or likely." Plaintiffs' theory is that the authority granted by the manual to withhold action under the circumstances therein outlined is inconsistent with and contrary to the mandatory requirements of Section 10(l), and that only the court in which such an action is required to be filed may determine whether injunctive relief is "appropriate."

The record shows that on June 29, 1970, the Regional Director filed a petition in the District Court seeking a Section 10(l) injunction against the union, thereby admittedly mooting plaintiffs' request for a mandatory injunction. However, although requesting a dismissal as to their prayer for a mandatory injunction, plaintiffs insist that the case is not moot and should be retained as to the declaratory judgment aspect. They argue that there is the possibility that in the future they might be adversely affected if any charges against the same or other unions are filed in the future and if the Regional Director again refrains from filing a suit for injunction on the authority of Section 10320 of the Manual. On such premise, plaintiffs contend that we should now declare invalid the 13-day delay of the Regional Director in seeking injunctive relief in this case as well as declaring invalid the manual provision.

As to the former, we believe that whether or not the Regional Director should have acted before June 29, 1970, any such issue is entirely moot since plaintiff cannot be further adversely affected. No useful purpose whatever

would be served by a declaration (Paragraph 1 of the prayer of the Amended Complaint) to the effect that "plaintiffs are now and have been since June 16, 1970, *entitled to the filing of application for injunctive relief* under Section 10(l) of the Act against the Union and its then unlawful and continuing unlawful conduct pending final adjudication of the Board *in Case No. 14-CC-604.*" As of June 29, 1970 there is an absence of any actual controversy as to this issue.

As to the remaining declaration sought (Paragraph 2 of the prayer) to the effect that the questioned provision of Section 10230 of the Field Manual of the National Labor Relations Board is invalid, it is our view that there is an absence of a justiciable or actual controversy. We note, inter alia, that the manual section does not mandatorily require the Regional Director to withhold court action even in situations where such action would appear to be useless. We also note the absence of any allegation that any other charges brought by plaintiffs are pending or even contemplated. That other charges may have been brought before *other* regional directors, or even by other employers,[19] as argued by plaintiffs in their briefs, would not create a justiciable controversy as between plaintiffs and the defendant regional director.

Of even more importance, it is our view that a declaration concerning the validity of a Section of the manual promulgated on behalf of the National Labor Relations Board should not be made in an action against a single regional director who obviously had no part in drafting or promulgating the same. Plaintiffs' theory as set forth in one of its briefs is stated as follows: "Plainly, the unauthorized and unlawful effort of the Board's General Counsel to write out of the statute the mandatory provisions written in and intended by Congress in Section 10(l)

19. This is not a class action

by the invalid promulgation of the 'rule' contained in Field Manual Section 10230 must be stopped." It is thus evident that the real party or parties in interest are not in Court. If plaintiffs have any controversy it is with the Board or with the General Counsel, not the regional director, and any action seeking a declaration of the validity of any Board rule or directive should be maintained against those who promulgated the same.

Accordingly, It Is Hereby Ordered that defendant's motion to dismiss should be and the same is hereby sustained, thereby mooting plaintiffs' motion for partial dismissal, and this cause is dismissed.

Dated this 9th day of December, 1970.

/s/ JOHN K. REGAN,
United States District Judge.

STATUTE INVOLVED.

National Labor Relations Act.

(61 Stat. 136, 29 U. S. C. Sect. 151, et seq.)

Sec. 10(j), 29 U. S. C. § 160(j):

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Sec. 10(l), 29 U. S. C. § 160(l):

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of

the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-609

TERMINAL FREIGHT HANDLING CO., ET AL., PETITIONERS

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 444 F. 2d 699. The memorandum and order of the district court are set forth at Pet. App. A20-A23.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1971, and the time for filing a petition was extended to and including November 1, 1971. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

451-174——71

QUESTION PRESENTED

Section 10(*l*) of the National Labor Relations Act provides that, if the Board's regional director "has reasonable cause to believe" that a charge alleging a violation of the secondary boycott provisions of the Act "is true and that a complaint should issue, he shall" petition the federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." The question presented is whether, under this provision, the regional director is required to petition for injunctive relief in every case where reasonable cause is found, or whether he retains a limited discretion not to petition where he finds that the union has already ceased the unlawful activity and is unlikely to resume it.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A24.

STATEMENT

On June 12, 1970, petitioners (herein "Terminal") filed an unfair labor practice charge with respondent, the Regional Director of the National Labor Relations Board, alleging that Teamsters Local 610 ("the Union") was engaging in a secondary boycott in violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B) (Pet. App. A3; 1105).[1] After investigation, the Regional Director determined that there was reasonable cause to believe

[1] "A" refers to the appendix to the briefs in the court below.

that the charge was true, and that, unless the conduct was terminated, a complaint should issue (A. 105). Specifically, he found that the Union failed to conform to the *Moore Dry Dock* standards for so-called "common situs" picketing,[2] in that it had not confined its picketing reasonably close to the normal work area of employees of Be-Rite Delivery Service, Inc., the employer with whom the Union had its primary dispute, and it had carried signs designating Sears, Roebuck and Company, a neutral employer, as the person with whom the Union had its dispute (A. 21, 24–25).

Upon receiving notification of the Regional Director's determination, the Union altered its picketing to conform to the *Moore Dry Dock* standards (A. 105), and, on June 18, 1970, offered to enter into an informal settlement under which it would agree not to continue or repeat the acts and conduct which the Regional Director had administratively determined to be unlawful (A. 105–106, 20–26). However, Terminal opposed the proposed settlement, advancing certain contentions which led the Regional Director to conduct a further investigation of the matter (Pet. App. A4; A. 107).

At the same time, Terminal commenced the present suit in the district court, to compel the Regional Director to petition that court for an injunction pursuant to Section 10(l) of the Act (Pet. App. A4; A. 6–11). Terminal amended its complaint to seek, in addition, a declaratory judgment (1) that at all times since June 16, 1970, it was "entitled to the filing of applica-

[2] *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547, 548.

tion for injunctive relief under Section 10(*l*) of the Act against the Union and its then unlawful and continuing unlawful conduct," and (2) that Section 10230 of the Board's Field Manual, issued by the Board's General Counsel, is "unconstitutional, unlawful, unauthorized by law or statute, null and void and of no force and effect" (Pet. App. A20; A. 84).[3]

On June 29, 1970, having determined on the basis of his further investigation that the Union's picketing still had an unlawful secondary objective, the Regional Director petitioned the district court for a temporary injunction. On July 2, 1970, he issued an unfair labor practice complaint against the Union. Meanwhile, on or about June 27, 1970, the Union resolved the primary dispute which gave rise to the unlawful conduct, and on June 29 all picketing ceased. (Pet. App. A4; A. 108.) In lieu of an injunction, the district court, over the objection of Terminal, approved a stipulation between the Regional Director and the Union which

[3] Section 10230 provides:

> Where there is reasonable cause to believe that a violation has occurred and that a complaint should issue in [8(b)(4), 8(e) and 8(b)(7)] cases, Section 10(*l*) of the Act authorizes injunctive relief.
>
> Under that section injunction proceedings are mandatory; however, if it appears that the union has voluntarily ceased engaging in the conduct and a resumption thereof is not threatened, so that there may be nothing to enjoin, commencement of 10(*l*) proceedings may be held in abeyance, as our experience in the courts has demonstrated that they are unwilling to accept filings where the activity has ceased and there is no likelihood of resumption. In the latter event, injunction proceedings should be instituted if it thereafter appears that a resumption of the conduct is imminent or likely.

provided for a cessation of the alleged unlawful picketing pending a final determination of the matter by the Board (Pet. App. A4, n. 5).[4]

Terminal then withdrew its request that the Regional Director be required to seek a Section 10(*l*) injunction, but adhered to its request for a declaratory judgment. The district court dismissed the complaint on the ground, *inter alia,* that the Regional

[4] Terminal appealed from the district court's order denying it full party status in the 10(*l*) proceeding. The court of appeals affirmed the order on the ground that such status is precluded by Section 10(*l*) *and* "the overall scheme of injunctive relief embodied in the National Labor Relations Act and the Norris-LaGuardia Act," which does not give charging parties "the right to privately seek injunctive relief." *Solien* v. *Miscellaneous Drivers and Helpers Union*, 440 F. 2d 124, 130 (C.A. 8). Terminal's petition for a writ of certiorari was denied. *Sears Roebuck and Co.* v. *Solien*, 403 U.S. 905, rehearing denied, November 16, 1971.

Terminal also instituted an action in the district court to enjoin the Regional Director from negotiating a formal settlement of the underlying unfair labor practice case on the ground, *inter alia*, that Terminal had not been afforded an adequate opportunity to participate in the negotiations. The district court dismissed the action for lack of jurisdiction over the subject matter, and Terminal appealed. In the meantime, the Union executed a formal settlement agreement with the Regional Director which provides for the entry of a Board order and a court of appeals decree enforcing that order. On March 19, 1971, after having considered Terminal's objections to the settlement, the General Counsel of the Board approved the settlement and submitted it to the Board, which stayed final action pending a decision on the appeal. On November 3, 1971, the court of appeals affirmed the dismissal of Terminal's complaint. The court held that Terminal was required to exhaust the adequate statutory remedies which existed for obtaining full board and appellate court review of its objections to the settlement. *Sears, Roebuck & Co.* v. *Solien*, Nos. 20462 and 20472 (C.A. 8), 78 LRRM 2700.

Director's action in ultimately seeking an injunction made Terminal's suit moot (Pet. App. A21–A23). The court of appeals reinstated the complaint, but rendered a declaratory judgment that the Regional Director was empowered, in the circumstances here, to decline to file a Section 10(*l*) suit for injunctive relief (Pet. App. A5–A19).

ARGUMENT

The decision of the court of appeals that Section 10(*l*) of the Act does not require the Regional Director to seek an injunction where the union has ceased the unlawful conduct and it is unlikely that the conduct will be resumed (Pet. App. A17) is correct. There are no decisions to the contrary. Accordingly there is no occasion for this Court to review that decision.

Section 10(*l*) of the Act provides that, if, after investigation of a charge involving a violation of Section 8(b)(4)(B), the Regional Director "has reasonable cause to believe such charge is true and that a complaint should issue, he shall" petition the federal district court "for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter." As the court below properly ruled (Pet. App. A17):

> We * * * conclude the "and that a complaint should issue" phrase reflects Congress' intention that the regional director retain limited prosecutorial discretion once he has made a reasonable cause determination * * *. The law

> does not and should not require the doing of useless acts. Rather than requiring the regional director to petition for injunctive relief in every case where reasonable cause is found, as Terminal contends, Congress intended that the regional director retain a limited discretion so that he would not be required to perform the meaningless act of petitioning for injunctive relief when the union has already ceased the unlawful activity and it is unlikely that the conduct will resume, nor to proceed in a case where the acts complained of are so insignificant as to be unworthy of the Board's and the Court's attention.[*]

As noted (*supra*, pp. 4–5), the Regional Director ultimately did seek a Section 10(*l*) injunction, the charged secondary conduct has ceased, the underlying primary dispute has been resolved, and the Board has under consideration the proposed formal settlement of the unfair labor practice case. In these circumstances, resolution of the issue of the Regional Director's discretion not to seek 10(*l*) injunctive relief would have no practical consequences in this case. See Respondent's Opposition to the petition in *Sears Roebuck & Sons* v. *Solien*, No. 1588, 1970 Term, certiorari denied, 403 U.S. 905, rehearing denied, November 16, 1971.

[*] The court below added, however, that, if the Regional Director, after making a "demand upon the union to cease its unlawful activity," is unable to secure cessation, "he must then petition for temporary injunctive relief and issue a complaint (or vice versa)" (*ibid.*).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-609

TERMINAL FREIGHT HANDLING CO. AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-609.

TERMINAL FREIGHT HANDLING CO. AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation with a membership of over 3,700 state and local chambers of commerce and trade associations, an underlying member-

ship of about 5 million business firms and individuals, and a direct business membership in excess of 32,000.[1]

The instant case raises recurrent and important questions of first impression in an area of vital concern to all employers. Congress has recognized that the secondary boycott is a vicious and devastating economic weapon; it destroys the free flow of commerce and places a neutral employer in jeopardy of losing all or part of his established business.[2] Accordingly, Congress not only outlawed such conduct, but through Section 10(l) of the Act,[3] provided *immediate* relief for the victimized employer. Unlike other provisions of the Act, that Section:

> 1. Commands the Board to give the investigation of secondary boycott charges immediate priority over all other charges; and
>
> 2. Orders the Board's Regional Directors to petition the Federal District Court for temporary injunctive relief, pending final adjudication by the Board, upon a showing of reasonable cause to support such a charge.

Despite such Congressional concern, however, as the court below recognized, Board Regional Directors have failed to seek injunctive relief in three quarters of cases where they have found reasonable cause to believe there has been a secondary boycott.[4] Thus, the issue raised here —whether a Regional Director is *required* by Section 10(l)

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1. This brief is filed with the written consent of all parties hereto pursuant to Supreme Court Rule 42(1).

2. See, e.g., II Legislative History of the Labor-Management Reporting Act of 1959, pp. 989, 1376, 1425, 1446, 1842 (1959).

3. National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 USC § 151, *et seq.* (hereinafter the "Act").

4. See Appendix to Writ of Certiorari (hereinafter referred to as "Appendix"), p. 8, fn. 9.

to seek such injunctive relief—does not merely represent a few isolated cases. Rather, it is typical of a general pattern of studied indifference by the Board to the desire of Congress to provide an immediate effective remedy. And this pervasive failure by the Board only serves to encourage unlawful secondary activity;[5] for the relief provided under § 10(l)—an immediate injunction—is the only effective deterrent against and remedy for this activity.[6]

The decision below sanctions a continuation of the Board's derogation of its statutory role. It grants the Board discretion in an area where such discretion is unwarranted and contrary to the intent of Congress. It dangerously erodes the only effective weapon against the devastating effects of the secondary boycott. Accordingly, a consideration of the issue here presented will not cause the Court's time to be misspent.

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5. Of the total unfair labor practice charges filed against unions in the Board's fiscal year 1969, over 2,100, or 32 per cent, involved alleged violations of § 8(b)(4). This represents an increase of 13 per cent over the § 8(b)(4) charges filed in fiscal year 1968. *Thirty-Fourth Annual Report of the National Labor Relations Board (1969)* p. 13. In addition, more than 50 per cent of the charges involving § 10(l) filed in 1969 were by employers with less than 30 employees. *Thirty-Third Annual Report of the National Labor Relations Board (1968)*, Table 18, pp. 238-239. Thus, it is all the more important that the Chamber present to the Court the consensus of these small employers who do not have the individual resources for such purpose.

6. A § 10(l) injunction is the only remedy which can prevent continuing irreparable harm to a victimized employer; the protection afforded by a permanent post-hearing injunction is illusory. The length of time required for the Board to investigate a secondary boycott charge and issue a complaint, for the trial examiner and the Board to rule on the complaint, and thereafter for a court of appeals to enforce the Board's order, largely negates the value of this proceeding to the afflicted; and perhaps crippled, employer. By the time a permanent injunction is ordered, the employer may be out of business or have been forced to settle the case on an inadequate basis.

For these reasons, the Chamber respectfully requests the Court to consider its views on this issue of serious national concern.[7]

II.

REASONS FOR GRANTING THE WRIT.

A. This Case Represents One Aspect of the Problems Raised in the Administration of Sections 8(b)(4) and 10(l) of the Act.

This case is one among many concerned with the Board's administration of Section 8(b)(4) and 10(l) of the Act; it is representative of a continuing effort through "elucidating litigation" to bring to the attention of the Board, the Board's General Counsel and the Federal courts the problems arising out of the Board's improper administration of § 8(b)(4) and § 10(l). This Court's acceptance of the petitions for certiorari in *Los Angeles Herald Examiner, supra*, and *Sears, Roebuck and Co.* v. *Carpet Layers Local 419, supra*, reveals its awareness of the transcendent importance of Section 10(l) proceedings. The principle underlying the Court's acceptance of these petitions—the full explication of the rights of charging parties—is also equally applicable to the instant case, where the charging party has sought only to obtain the proper statutory remedy.

In view of the recurrent nature of the issues raised here, and of the close relationship of this issue to other signifi-

7. The Chamber previously filed amicus briefs in *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, ... U. S. .... No. 1588 (October Term, 1970); *The Los Angeles Herald Examiner* v. *Kennedy*, ... U. S. .... No. 350 (October Term, 1970); and *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655, dealing with the related question of the rights of a charging party once the Board has initiated a § 10(l) proceeding. The instant case, as discussed *infra*, presents another aspect of this problem.

cant issues respecting charging party rights under Sections 8(b)(4) and 10(l), the Court should grant this petition. The present case also provides the Court with an appropriate vehicle to delineate the role of the Board in this important area of the law.

B. The Position of Petitioner Is Wholly Consistent with the Interpretation of Section 8(b)(4) and of Section 10(l) Made by This Court in Other Decisions.

In other decisions involving s 8(b)(4) and s 10(l), this Court has strictly construed the Congressional mandate expressed therein. In *Sears, Roebuck and Co. v. Carpet Layers, Local 419, supra*, this Court held that the provision of § 10(l), directing the Regional Director to apply for a temporary injunction "pending final adjudication of the Board . . ." (emphasis added), did not require that injunctive relief, if granted, "would remain in effect until the Board's order with respect to the underlying unfair labor practice was either enforced or denied enforcement by the court of appeals." 397 U. S. at 198. Strictly construing the language of the Act, this Court held that § 10(l) authorizes an injunction pending only a final adjudication by *the Board*, but not pending review by a court of appeals.

Similarly, in *N. L. R. B. v. Operating Engineers, Local 825 (Burns and Roe, Inc.)*, 400 U. S. 297, 74 LRRM 2129 (1971), this Court strictly interpreted s 8(b)(4) of the Act. There, in reversing the Third Circuit, this Court

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8. The Board's settlements in the 10(l) area are under close scrutiny by the General Counsel and Members of the Board in *Sears, Roebuck and Co. v. Sheetz*, [illegible] and 20472 (8th Cir., Nov. 5, 1971) and as a result of an extensive study undertaken by the General Counsel showing the relationship between § 10(l) decision dates and Board decisions [illegible] in Board fiscal year 1967, as well as other considerations, Board practice in this area. Most § 8(b)(4) cases are settled, but with such minimum sanctions as to be without significant deterrent value. If this case should stand the present [illegible] settlement practice will continue.

held that the "cease doing business" object proscribed under § 8(b)(4)(B) prohibited not only activity directed towards a "termination" of a business relationship, but activity designed to make an employer temporarily "cease doing business" with another employer. In the instant case, as in *Burns and Roe*, a loose interpretation of the Act would only serve to encourage "flagrant secondary conduct with . . . most serious disruptive effects . . ." To hold that such conduct "was not prohibited [or subject to remedy] . . . would be largely to ignore the original Congressional concern." 74 LRRM at 2132. A precise interpretation of the secondary boycott provisions of the Act is required.

C. The Decision Below by Permitting the Board to Exercise Discretion, Despite the Mandatory "Shall Petition" Language of Section 10(l), Wholly Distorts the Statutory Purpose Underlying 10(l) and Misconstrues the Nature of the 10(l) Remedy.

The decision below defeats the very purpose of § 10(l): immediate, effective interim relief against a secondary boycott. This Congressional intent is clearly revealed in the Senate Majority Report:[9]

> Section 10(l) makes it mandatory upon the Board to petition for injunctive relief in the case of strikes or boycotts that are alleged to constitute unfair labor practices within the meaning of paragraphs (A), (B) and (C) of Section 8(b)(4). Moreover, cases of this type are to be given priority, and when the board agent charged with the investigation has reasonable cause to believe that the charge is true and that a complaint should be issued, *he is required to petition the district court for appropriate injunctive relief* pending final adjudication by the Board. (Emphasis added.)

Congress obviously believed that secondary boycotts were so devastating in their effect on neutral employers and

9. S. R. No. 105, 80th Cong., 1st Sess. (1947) at 27.

the innocent public alike, that Regional Directors *must be required*, without qualification or limitation, to apply for a § 10(l) injunction upon a finding of reasonable cause. Had Congress intended otherwise, it would have so provided. In Section 10(j) Congress provided, in contrast to the "shall petition" language of § 10(l), that "the Board shall have power . . . to petition."[9] The decision below ignores the careful distinction Congress drew between a mandatory power (§ 10(l)) and a discretionary power (§ 10(j)).[10]

Moreover, the failure of the court below to recognize the clear intent of Congress leads to the following anomalous results:

First, Section 10(l) is designed to deter secondary boycotts. However, the Board's failure to seek injunctive relief in at least three-fourths of "reasonable cause" charges filed under Section 8(b)(4) negates the deterrent value of § 10(l). Deterrence results only when the sanction against unlawful activity is immediate. An injunction issued months after the event is no deterrent.

Second, while the court below apparently equated the exercise of limited discretion by Regional Directors with a desire to attempt settlement,[11] failure by a Regional Direc-

10. That Congress clearly intended § 10(j) to operate mandatorily is clearly revealed by the fact that in 1959 Congress refused to amend § 10(l) to give Regional Directors discretion to seek an injunction "if under all the circumstances equitable relief is appropriate . . ." (See 105 Cong. Rec. 17881, 86th Cong., 1st Sess. (1959)). Congress' refusal to so amend § 10(l) is further proof, if any is required, that Congress intended the § 10(l) remedy to be mandatory, not discretionary.

11. The court suggested that "We think it is clearly within [the Regional Director's] discretion to make an initial demand upon the union to cease its unlawful activity. However, if he is unable to secure cessation upon such summary demand and negotiation, he must then petition for temporary injunctive relief and issue a complaint (or vice versa)." Appendix, p. 17. In effect, the Board, by exercising discretion, has rewritten the Act. Contrary to the Board's contention, however, discretion ends once a reasonable cause determination has been made.

tor to request a § 10(l) injunction will only frustrate settlement. As any experienced lawyer will testify, the filing of a lawsuit, particularly an injunction action, is one of the most effective means of promoting a rapid settlement of a dispute. And as the court below noted, the Regional Director may still negotiate a settlement after petitioning for § 10(l) relief (Appendix, p. 17).

Finally, the Court's conclusion that the phrase "and that a complaint should issue" reflects "Congress' intention that the Regional Director retain limited prosecutorial authority once he has made a reasonable cause determination"[12] is inconsistent with the legislative intent. A finding of "reasonable cause" was contemplated as concurrent with a decision by the Regional Director that "complaint should issue." The finding of "reasonable cause" and the consequent decision to issue complaint are not separate, disjunctive obligations. They are a single, inseparable obligation.

A Regional Director exercises discretion only in deciding whether a charge is based upon reasonable cause. A district court in a § 10(l) proceeding exercises discretion in deciding whether, under normal equitable principles, an injunction should issue. Such exercise of discretion by a Regional Director and a district court fully safeguards the rights of a respondent in a § 8(b)(4) case and belies any claim that the position urged here will result in an inflexible administration of the Act.

12. Appendix, p. 17.

CONCLUSION.

For the foregoing reasons, the Chamber urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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SUPREME COURT, U.S.
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Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Regional Director's Opposition to the Petition for Writ of Certiorari herein is based on the assertion that there is no profit to be derived, either by the petitioners or otherwise, from a decision by this Court on the merits

of the question presented. This contention is incorrect and misleading and requires response.

(1) This case arises out of a "Complaint For Mandatory Injunction" which the petitioners filed in the district court when the Regional Director refused to seek injunction relief despite the statutory command of Section 10(1) that he "shall" do so. After permitting the petitioners to be unnecessarily picketed for two weeks subsequent to his conclusion that their rights had been violated by such picketing, the Director finally did seek injunctive relief. By that time, however, the dispute which had given rise to the picketing had been resolved and the picketing had ceased. Under these circumstances, and because the Director persisted in his view that he was under no duty to seek injunctive relief except as his unreviewable discretion dictated, the petitioners amended their district court action; they no longer sought to compel the filing of an injunction petition which had already been filed, but, instead, sought a declaratory judgment as to the nature of the statutory rights and duties created in Section 10(1), as to which the parties had such vastly differing interpretations.

The ensuing litigation was at no time premised upon any alleged need for immediate relief *in this case*. Rather, that litigation was pursued for the express purpose of clarifying the law in an area which was unclear, which was particularly important to charging parties before the Board whose principal protection from the effects of unlawful secondary boycotts was the subject of the dispute, and which involved a regularly recurring problem which would cause similar irreparable injury to others but for judicial resolution.

Illustrative of the need for such a resolution here is the conduct of the Board's agents in the recent case of *Local Union No. 562, affiliated with U. A. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Phillips Plumbing and Heating Co.)*, 17-CC-467. A charge was filed in that case on October 22, 1971 alleging a respondent-union's violation of Section 8(b)(4)-(ii)B of the National Labor Relations Act. Section 10(1) affords mandatory injunctive relief for such violations. On December 3, 1971, almost six weeks later, the General Counsel determined that there existed reasonable cause to believe the charges were true and a complaint should issue. This delay was permitted to occur despite the direction in Section 10(1) that the Board's investigation should be made "forthwith" and be given precedence over all other pending matters except for like charges of unlawful boycott activity. As a consequence of the charged illegal conduct, the aggrieved neutral employer was forced to cease doing business on the job site at which the dispute occurred and consequently lost its contract with the general contractor. Nonetheless, as of December 17, 1971, the Board's agents had neither petitioned for injunctive relief nor effected any other disposition nor granted any other relief. Indeed, the respondent union had not even been contacted by the Board's agents for the purpose of achieving some form of settlement until December 16, 1971.

It is submitted that such conduct cannot be reconciled with the language of Section 10(1) or even the decision of the court below. To the extent that such procedures evidence the Board's view of the permissible limits either of the statutory language or the decision below, the need for elucidation of the rights and duties imposed by Section

10(1) becomes particularly clear,—especially in view of the increasing part of the Board's total caseload which such cases constitute. (See p. 12, Petition for Writ of Certiorari, and statistics set forth there).

(3) The Regional Director's Opposition to the Petition herein seeks to convey the impression that the merits of the underlying dispute are before the Board for consideration so that there is imminent a "final adjudication of the Board" which would render moot all proceedings under Section 10(1). (Br. Opp., p. 7). However, neither the facts nor the conclusion which should be derived from them are as the Director implies. First, this case arose out of a suit for declaratory judgment and was premised on the need for a resolution of a disputed and recurring problem rather than on any need for relief in a specific case. The issuance of a Board order on the merits could not contribute to the resolution of the procedural issues raised in the declaratory judgment action.

More fundamentally, however, the Regional Director is incorrect in asserting that the matter is being considered by the Board. On November 3, 1971 the United States Court of Appeals for the Eighth Circuit issued its decision in *Sears, Roebuck and Co., et al.* v. *Solien*, Nos. 20462, 20472, 78 LRRM 2700 ("Solien III") reference to which has been made in prior submissions to the Court in this case, and which involved the underlying case from which the instant procedural matters arose.* As a result of that opinion, Sears,

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*Solien III involved an effort to secure a determination of the participatory rights to which charging parties before the Board are entitled in the administrative disposition of their cases. Specifically, the charging parties there

Roebuck and Co., one of the charging parties below although not a party to the proceedings in this Court, sought a reconsideration by the General Counsel of this disposition of the merits of the underlying case and a transfer of the case from the Board, where it had been pending awaiting the decision in Solien III, to the office of the General Counsel. The General Counsel agreed to such a reconsideration (Appendix "A" attached hereto) following which, on No-

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claimed a right to participate in the negotiation of any settlement agreement which would affect their vital interests and adjust their legal rights, together with sufficient information from the Board's investigation to permit them to make informed and intelligent judgments and proposals in any such negotiations. While these contentions were made in the context of a settlement of the merits of the substantive charges filed with the Board, they would appear to apply equally to stipulations reached in district court injunction proceedings under Section 10(1) in which a favorable decision is at least as important to charging parties' rights and interests as at any other posture of the case. The Eighth Circuit's decision did not reach the merits of the charging parties' contentions, however, since the court held that the charging parties had not exhausted the administrative remedies available to cure the General Counsel's refusal to allow the requested participation. In recognizing the right of review of what appears to be a prosecutorial function of the General Counsel, the Court advanced the status of charging parties' rights under the Act, — an advance which would seem to apply equally to charging parties' rights to secure review of a district court's failure to permit informed participation in the negotiation of stipulations executed under Section 10(1). Moreover, such a development is entirely in accord with this Court's recent decision in *National Labor Relations Board* v. *Plasterers' Local Union No. 79, Etc., et al.*, Nos. 70-63, 70-65, December 6, 1971.

vember 22, 1971, the Board agreed to defer any further consideration or action until advised of the General Counsel's determination (Appendix "B"). Accordingly, the underlying case out of which the instant dispute arose remains pending and unresolved before the General Counsel. There is no proceeding currently before the Board. No "final adjudication of the Board" in this case is imminent, the matter is neither actually nor technically moot; and the Regional Director's contrary implication is incorrect.

Moreover, the Regional Director's assertion of mootness is predicated on acts which he committed apparently for the purpose of preventing any judicial resolution of the questions presented in the instant Petition. The Director found the existence of the requisite "reasonable cause" to believe the law was violated on June 16, 1970. Since the union's secondary boycott activity continued unabated thereafter, and since the Director declined to seek the "mandatory" injunctive relief therefor provided in Section 10(1), the petitioners, on June 19, 1970, filed the instant case to compel his doing so. On June 27, 1970, the dispute which had given rise to the unlawful boycott was resolved, and on June 29, the picketing ceased. However, it was not until June 29, 1970—hence *after* the resolution of the dispute, *after* the picketing had ended and *after the institution of this suit*—that the Director petitioned for an injunction to restrain picketing which had already been discontinued. The basis for this belated adherence to statutory direction is suggested by the fact that the Director thereupon moved to dismiss this suit, which sought a judicial determination of the nature of his duty to act promptly to enjoin unlawful picketing, on the ground that he had in fact sought such injunctive relief and the case was therefore "moot". The

Director coupled this argument with the assertion that he had no judicially reviewable duty to act but, having acted, the case should not proceed further.

The Director's Opposition to the Petition herein relies again on such a contention in a continuing effort to prevent ultimate judicial resolution of the issues raised in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

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November 15, 1971

Mr. George A. Leet
Associate Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Re: *Miscellaneous Drivers and Helpers Union, Local 610 (Sears, Roebuck and Co.)* Case Nos. 14-CC-603 and 14-CC-604

Dear Mr. Leet:

Pursuant to our oral request that the General Counsel reconsider approval of the instant settlement agreement in light of the decision by the Court of Appeals for the Eighth Circuit in *Sears, Roebuck and Co.* v. *Solien* (No. 20462 and No. 20472), and further reconsider our Objections to the Regional Director dated June 29, 1970 and Supplemental Objections to the General Counsel dated February 18, 1971, we have been advised today that the General Counsel has agreed to reconsider approval of the instant settlement agreement in light of said decision of the Eighth Circuit. We have been further advised that the General Counsel will provide the Union with a full opportunity to present its position on this matter.

In view of the foregoing, we request that your letter of November 8, 1971 setting a date for filing objections or statements of position to the Board be vacated and that, in accord with our Motions of March 26, 1971, the instant case be transferred to the office of the General Counsel. Alternatively, we would request that the time for filing objections or statements of position to the Board be extended until the General Counsel completes his consideration of this matter and at that time, if a new filing date is required, a reasonable date then be fixed.

Very truly yours,

LAWRENCE M. COHEN

Lawrence M. Cohen

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LMC:hy

cc of the attached letter sent to the following:

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APPENDIX B

NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

November 22, 1971

Re: Sears, Roebuck and Co.
Case Nos. 14-CC-603, 14-CC-604

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Dear Mr. Cohen:

This is with reference to your letter of November 15, 1971 concerning the above proceeding.

Since this office has been advised by the Office of the General Counsel that he has agreed to reconsider approval of the settlement agreement, the Board will defer any further consideration or action until after we are advised of the General Counsel's decision. Accordingly, all parties are advised that after the General Counsel has notified the Board of his decision and if he decides to affirm the action previously taken, a new date will be established for the

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MOTION TO INTERVENE ON BEHALF OF SEARS, ROEBUCK AND CO.

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MOTION TO INTERVENE ON BEHALF OF SEARS, ROEBUCK AND CO.

Sears, Roebuck and Co. ("Sears") hereby respectfully moves to intervene in this case. Sears and Petitioner Terminal have been identically aggrieved by various actions of Respondent Solien. In the present case, that aggrievement consists of Solien's refusal to promptly seek injunctive relief, in derogation of the mandatory requirements of Section 10(l) of the National Labor Relations Act, to protect Sears and Terminal from the devastating effects of unlawful secon-

dary boycott activities. Since the instant petition was filed, Sears and Terminal have also been subjected to two other deprivations arising out of the same factual situation, by decisions of the Eighth Circuit. Petitions for certiorari in these cases will be submitted to this Court no later than January 13, 1972. Intervention by Sears in the present case is, therefore, appropriate.

More specifically, the present motion is founded on the following grounds.

1. The matters at issue in the instant case directly involve Sears as well as Terminal. Sears, as well as Terminal, was victimized by union secondary boycott activity flowing out of the same underlying dispute. As a result, Sears also filed unfair labor practice charges with Solien. And, as in the case of Terminal, although Solien found that there was reasonable cause to believe such charges were true, notwithstanding the mandatory language of Section 10(1), no injunctive relief was sought. Instead, Sears was subjected, along with Terminal, to a lengthy continuation of the union's unlawful conduct. It was not until Sears joined with Terminal in instituting the present action that Solien petitioned for temporary injunctive relief which, in turn, caused the union to cease its impermissible conduct. Believing that its objective had been achieved, Sears then voluntarily withdrew as a plaintiff.

The decision below, by sanctioning future similar conduct by Board Regional Directors, rekindles Sears concern. Any immediate gain that may have accrued to Sears by this action has now been far outweighed by the substantial erosion of the secondary boycott protections of the Act affected by the Eighth Circuit. The

present case is not an isolated one but, instead, is part of a pattern of conduct by the Board which raises recurrent issues of serious national concern.[1] This severe remedial backsliding will necessarily involve Sears.[2] As a result, and because Sears has a common question of law and fact with the main action, this motion to intervene is filed so that Sears may resume its participation in this case.

2. The instant case, known as "Solien II", presents only one aspect of a multi-faceted controversy. Sears and Terminal were also denied various participatory rights in the district court 10(1) proceeding after Solien finally commenced that suit. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), *cert. den.*, No. 1588, O.T. 1971 ("Solien I"). In addition, Sears and Terminal were also aggrieved by Solien's refusal to permit their meaningful participation in the settlement of their underlying Board charges. *Sears, Roebuck and Co.* v. *Solien*, —F.2d—, 78 LRRM 2700 (8th Cir. No. 3, 1971) ("Solien

[1] The widespread nature of the conduct here at issue is also evidenced by the close scrutiny which the general counsel of the Board is now giving to the *substantive* components of settlements in the secondary boycott area. This examination is the result of the decision in *Sears, Roebuck and Co.* v. *Solien*, — F. 2d —, 78 LRRM 2700 (8th Cir. Nov. 3, 1971) ("Solien III"), as well as the extensive study undertaken by Sears in this case to examine in depth Board practice. See brief of *amicus* Chamber of Commerce of the United States of America, n. 8. The present case provides the Court with the opportunity to delineate the Board's correlative *procedural* obligations in the context of a continuing controversy in this important area of the law.

[2] Sears, as the largest retailer in the United States, is frequently the target of proscribed secondary boycott activity. See, e.g., in addition to the present case, *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U. S. 655 (1970).

III"). Finally, in an extension of *Solien I,* both employers were also recently denied even the limited rights afforded charging parties in a Section 10(1) proceeding that it was presumed the decision below recognized, i.e., the right to independently oppose a stipulation negotiated in lieu of injunctive relief. *Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610,* — F.2d — (8th Cir. Dec. 17, 1971) ("Solien IV").[3]

Petitions for writs of certiorari are presently being prepared in both *Solien III and IV* and are expected to be filed no later than January 13, 1972. In addition, because the various *Solien* cases *in toto* provide this Court with a desirable vehicle to consider all aspects of the participatory rights of charging parties, Sears and Terminal contemplate filing a joint motion to defer consideration of the present case so that it may be considered in conjunction with *Solien III and IV.* The present motion to intervene, along with the similar motion Sears will file in *Solien IV,* supplements this

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[3] Sears also contemplates moving to intervene in *Solien IV* as soon as the petition for certiorari is filed in that case. This motion will be predicated on various considerations: (i) that the errors complained of in *Solien IV* were committed in district court proceedings which involved Sears and which, on review of a different part of the court's decision, formed the basis for Sears petition for certiorari in *Solien I;* (ii) that the subject matter of *Slien IV*—the rights of charging parties in a Section 10(1) proceeding—is one which Sears and other parties have heretofore presented to this Court but which, because of mootness, has not yet been adjudicated (see, e.g., *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers, supra,* and *The Los Angeles Herald Examiner* v. *Kennedy,* 400 U.S. 3 (1970)); and (iii) that because *Solien IV* arises as part of a viable controversy, any decision of this Court will necessarily delineate Sears rights as well as those of Terminal.

joint motion by insuring that the same parties will be before the Court in each of the *Solien* cases.

3. Granting the instant motion will in no way delay these proceedings, burden the Court or impair any adjudication of the rights of the parties. Sears does not intend to file any brief of its own in support of the present petition but, rather, would merely adopt the position that has already been advanced by Terminal and *amicus* Chamber of Commerce. The only document that Sears would contemplate filing at the present time is the aforesaid joint motion to defer consideration of this case. And this motion, as previously noted, would facilitate the disposition of this matter by providing the Court with an opportunity to consider all variants of the question presented and ensuring that its time will not be misspent.

4. Issuance of decision by the court below does not preclude intervention at this time. The policies underlying intervention, as set forth in Rule 24 of the Federal Rules of Civil Procedure, may also be applicable in appellate courts. *United Automobile, Aerospace and Agricultural Implement Workers of America, Local 238* v. *Scofield,* 382 U.S. 205, n. 10 (1965). In an appropriate case, such as the instant one, appellate intervention should be allowed. See, e.g., *McKenna* v. *Pan American Petroleum Corporation,* 303 F. 2d 778, 779 (5th Cir. 1962); *Wolpe* v. *Poretsky,* 144 F. 2d 505, 507-8 (1st Cir. 1944); and Moore, Federal Practice (2nd Ed.), Sec. 24.13. This Court recognized this principle in *N.L.R.B.* v. *Acme Industrial Co.,* 385 U.S. 432 (1967), where, on motion, intervention was granted to a party who had not participated in the proceedings before the court of appeals Order of Court dated May 2, 1966 in No. 52, O.T. 1966.

5. Counsel for Terminal has informed the undersigned he has no objection to the granting of this motion.

WHEREFORE, Sears prays that it be permitted to intervene in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-609

TERMINAL ~~FREI~~GHT HANDLING CO. AND TERMINAL FREIGHT COOPERATIVE ASSOCIATION,
Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE PHILLIPS PLUMBING AND HEATING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.*

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*Pursuant to Rule 42(1) of the Rules of this Court, oral consent has been received from all parties hereto to the filing of this brief *amicus curiae* and written consents are being lodged with the Clerk of the Court.

I.

INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of Phillips Plumbing and Heating Company ("Phillips"), a small employer located in Davenport, Iowa. Phillips was recently subjected to a devastating secondary boycott and, as a result, filed unfair labor practice charges with the National Labor Relations Board in order to seek the protection afforded by Section 10(l) of the National Labor Relations Act.[1]

As in the instant case, the Regional Director of the Board found that there was reasonable cause to believe that Phillips' charges were true. Nevertheless, Phillips, like Terminal and Sears in the present case, was not afforded the relief contemplated by Section 10(l). In addition, the Board negotiated a settlement agreement without the charging party's participation. The secondary boycott was continued at Phillips and no injunctive relief was sought. Phillips, as a result, lost valuable contracts in business which it may never be possible to recoup.

Counsel for Phillips is a large national law firm located in Chicago, Illinois representing many employers, both small and large, throughout the United States. The above experience of Phillips, in Counsel's experience, is by no means unique. Rather, it is part of a pervasive practice followed uniformly by the Board. Those cases in which

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1. *Local Union No. 562, Affiliated with the U. A. of Journeyman & Apprentices of the U. S. & Canada, AFL-CIO (George Koch Sons, Inc.)*, N. L. R. B. Case No. 17-CC-467.

the Board fails to carry out the statutory command are the rule rather than the exception in Section 10(1) proceedings.[2]

II.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. The Problems Raised in the Administration of Section 10(1) of the Act Are Exemplified by This Case, and Should Be Ruled Upon by This Court to Effectuate the Purposes of the Act.

As noted above, the experience of Terminal and Sears here is typical of a recurrent pattern utilized by the Board in its administration of the Act. The resultant harm experienced by employers, whose only effective protection from secondary boycotts is Section 10(1),[3] is widespread and substantial. Since most charging parties are small employers who can afford neither prolonged picketing or expensive litigation,[4] this case is an appropriate vehicle for this Court to now resolve the present controversy.

2. As the Court below found, Board Regional Directors seek 10(1) injunctive relief in only *one-quarter* of all cases where there has been a finding of reasonable cause to believe there has been a secondary boycott. App. to Pet. for Cert., p. 8, n. 9.

3. That a Section 10(1) injunction is the only effective remedy is adequately demonstrated by the substantial delays experienced when alternative routes are followed. An employer who is experiencing secondary pressures cannot withstand those pressures through the lengthy ordeal of investigation of the charge and issuance of a complaint, of the hearing before the Trial Examiner and a ruling upon his decision by the Board; and of finally enforcing the Board's order in a court of appeals. Through participation in the Board's procedures, Phillips and others have realized not only the costly delays but also their paralyzing economic effect upon the employer.

4. For example, more than 50% of the charges involving Section 10(1) that were filed in 1969 were filed by employers with less than 30 employees. *33rd Annual Report of the National Labor Relations Board (1968)*, Table 18, pp. 238-239.

B. The Present Case Arises in the Contexts of Other Significant Issues Which This Court Should Also Consider.

The present case is being submitted to the Court as part of a multi-faceted dispute raising numerous significant questions affecting the rights of charging parties generally. These questions are also recurrent and, for the reasons previously discussed, likely to continue to escape review by this Court. Phillips therefore concurs with the position of Terminal that the present case should be considered in conjunction with these related matters. Petitions for certiorari in these cases have recently been filed with this Court,[5] and to underscore the overall importance of this case, identical versions of the present brief are also being filed therein.

CONCLUSION.

For the aforegoing reasons, Phillips requests this Court to grant the instant petition for certiorari.

Respectfully submitted,

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5. *Sears, Roebuck and Co.* v. *Solien*, No. .....; and *Terminal Freight Cooperative Association* v. *Solien*, No. .....